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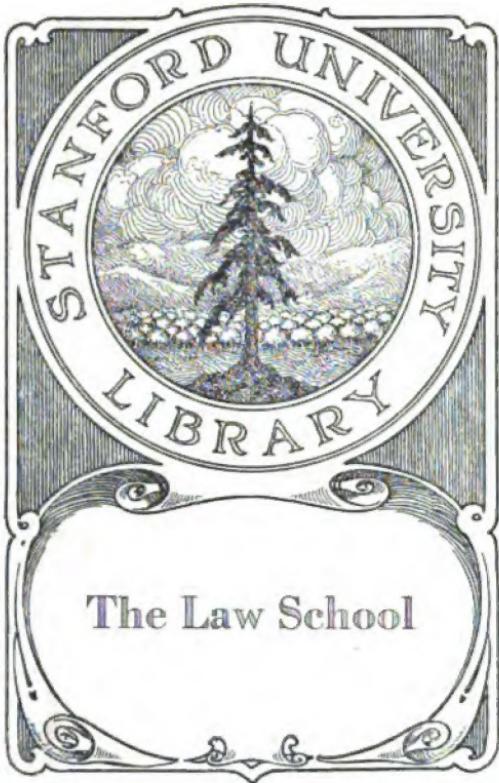
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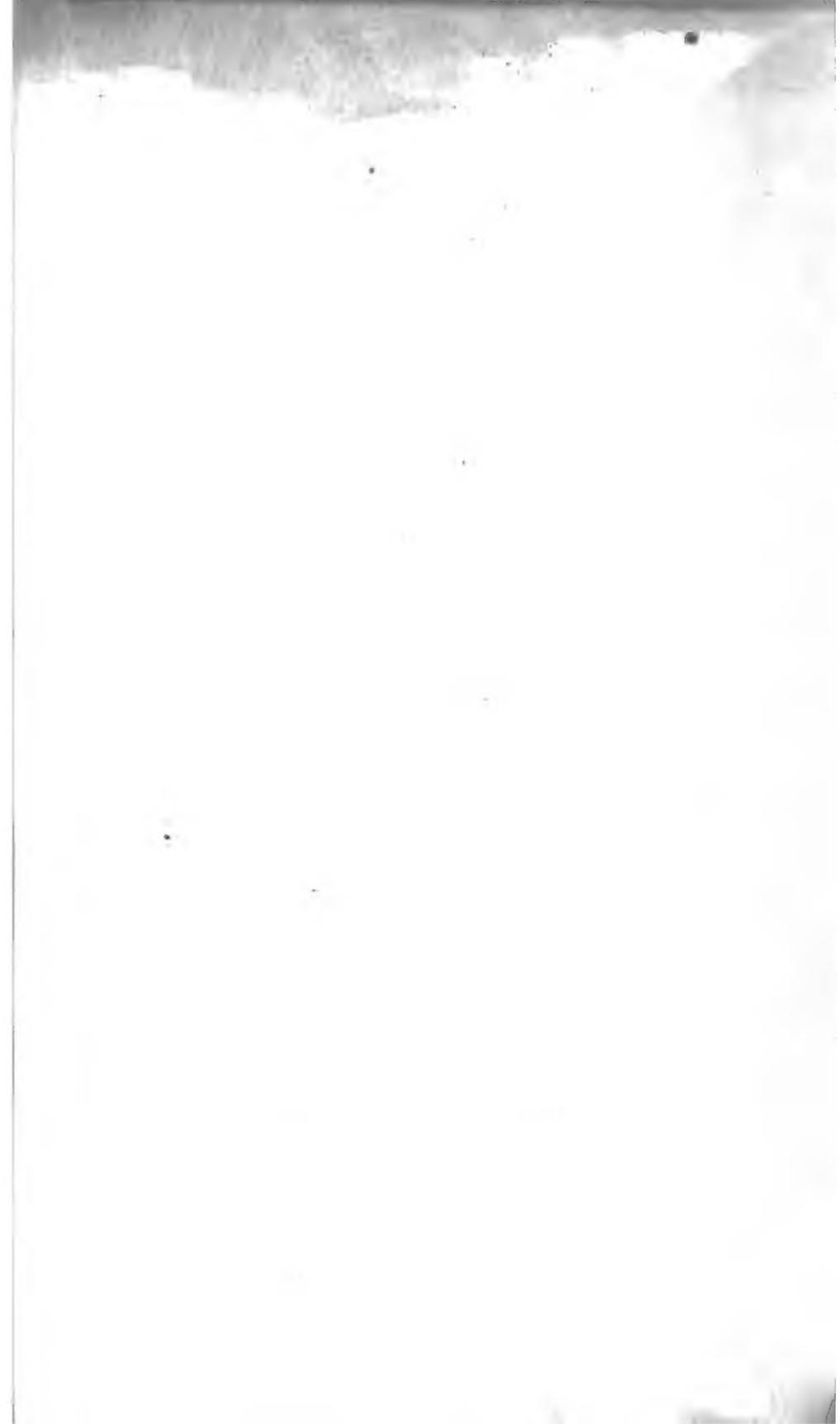
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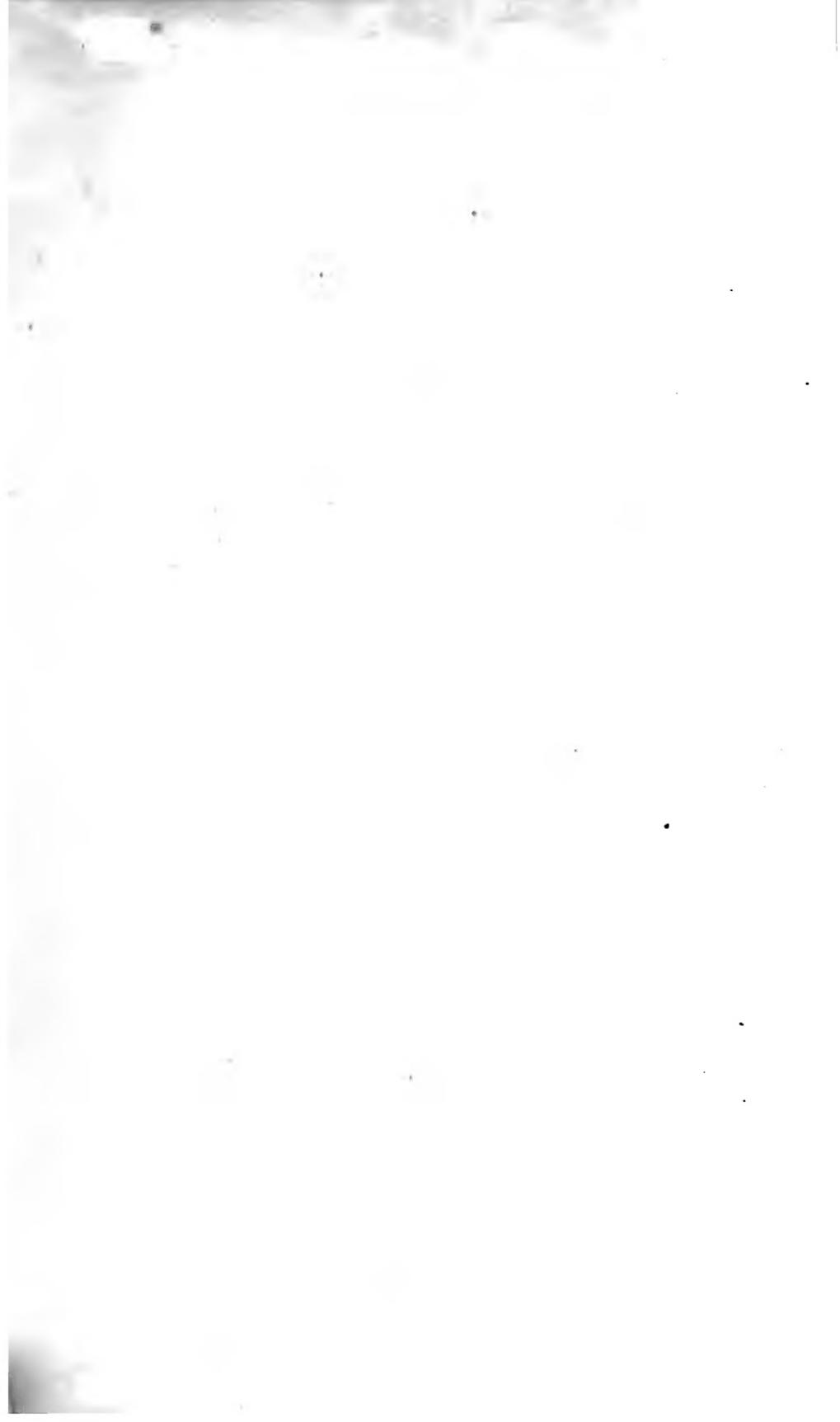
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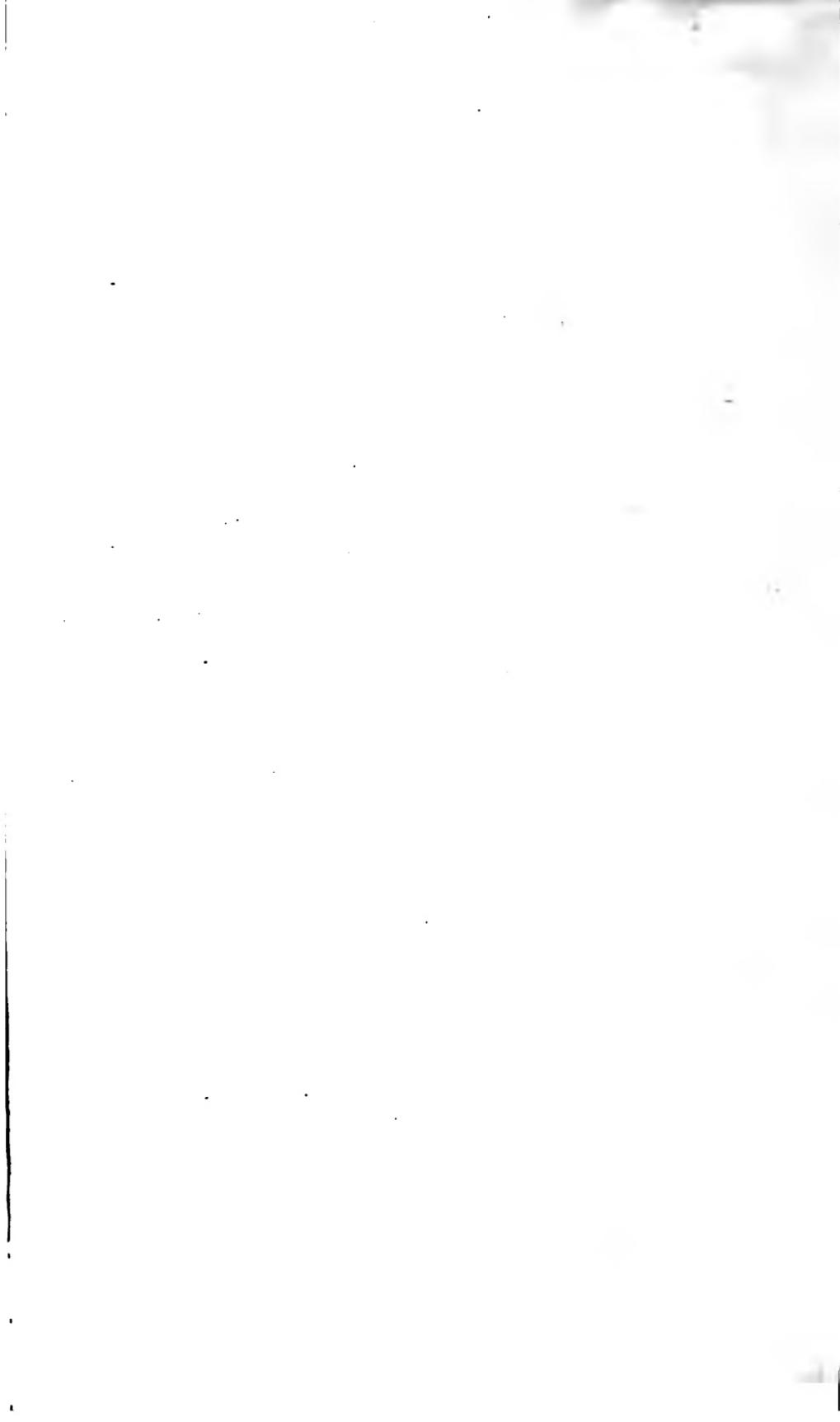
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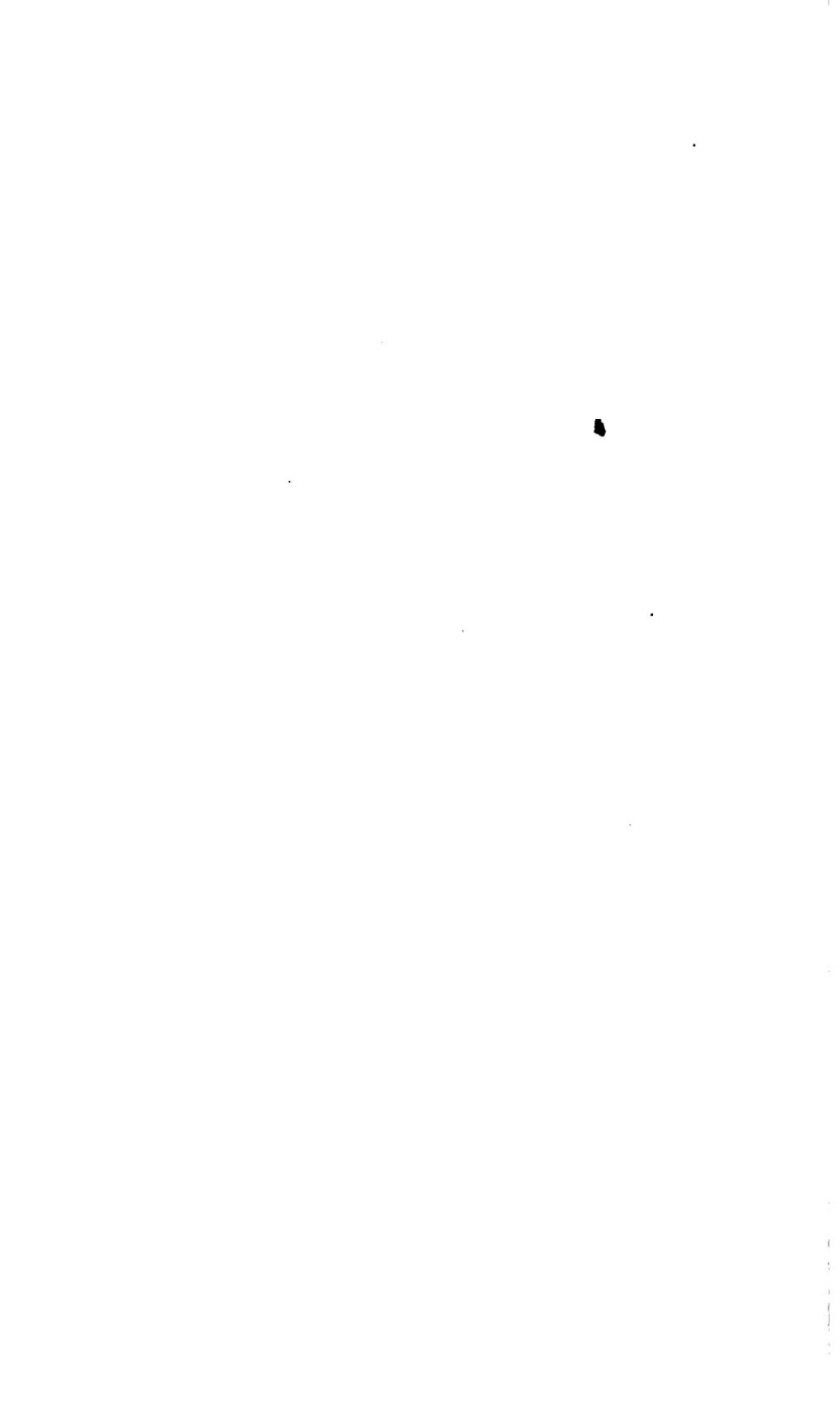
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED FROM THE CONTEMPORANEOUS REPORTS AND FROM THE DECISIONS IN THE HOUSE OF LORDS,
WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

VOL. CX.

CONTAINING

THE CASES ARGUED AND DETERMINED IN THE COURT OF QUEEN'S BENCH,
AND IN THE EXCHEQUER CHAMBER, IN THE LATTER PART OF
HILARY TERM, AND EASTER AND TRINITY TERMS, 1862.

JAMES PARSONS, Esq.,
EDITOR.

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ON APPEAL FROM THE COURT OF QUEEN'S BENCH.

WITH TABLES OF THE NAMES OF THE CASES REPORTED AND CITED, AND
AN INDEX OF THE CONTENTS.

BY
WILLIAM MAWDESLEY BEST, OF GRAY'S INN,
AND
GEORGE JAMES PHILIP SMITH, OF THE INNER TEMPLE,
ESQRS., BARRISTERS AT LAW.

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DURING THE PERIOD COMPRISED IN THIS VOLUME.

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CASES

ARGUED AND DETERMINED

THE QUEEN'S BENCH,

Hilary Term,

AND THE

SITTINGS IN BANC AFTER HILARY TERM.

XXV. VICTORIA. 1862.

(CONTINUED FROM VOL. I.)

GOODMAN v. BOYCOTT. Jan. 30.

Detinue.—Title deeds.—Devisee.

Declaration in *detinue* for title deeds. Plea, that the deeds were intrusted to and deposited with the defendant by one G., deceased; that the plaintiff claimed the right to the possession of them as devisee under the will of G.; that the detention was a loss of them by the defendant before the death of G., and that the defendant never had possession of them since the death of G. On demurrer to this plea: Held by Wightman, J., that the plea was bad, as it did not allege that the deeds were destroyed; and, therefore, assuming that they were still existing, and as the property in them was vested by the devise in the plaintiff, he might maintain *detinue*; Held by Blackburn, J., that the plea was good, as it did not admit that the defendant had possession of the deeds since they were the plaintiff's.

DETINUE.—The declaration alleged that the defendant detained from the plaintiff his title deeds of certain messuages, or tenements, and land, at a place called Windmill Row, in the borough of *Kidderminster, in the county of Worcester, that is to say, a counterpart of a lease, dated the 28th November, 1796, made between Edward Davis, and Sarah, his wife, of the one part, and James Jauncy of the other part; a certificate of redemption of land tax; and a chirograph of a fine, of and relating to the said messuages or tenements, and land; and also a document in writing, being an undertaking given and made by one Mr. Bradland, relating to the said messuages or tenements and land; whereby the plaintiff was prevented from selling or mortgaging the same, as he otherwise would have done: and he

claimed a return of the deeds, or their value, and 50*l.* for their detention.

Plea: That the deeds in the declaration mentioned, were intrusted to and deposited with the defendant by one — Goodman, deceased, and that the plaintiff claimed the right to the possession of the deeds as devisee under the last will and testament of the said — Goodman, and never had any other interest in the deeds. It then averred that the detention in the declaration mentioned was a loss by the defendant of the deeds, so deposited with him as aforesaid, before the death of the said — Goodman, and that the defendant had never had possession of the deeds since the death of the said — Goodman.

Demurrer and joinder.

The demurrer was argued at the sittings in banc, after Michaelmas Term, 1861, on the 27th November, before Wightman and Blackburn, J.J.(a) . . .

Montague Smith (*H. Cole was with him*), in support of the demur-
*3] rer.—The plea affords no answer to the *declaration. The pro-
perty in the deeds accompanies the title to the land, and passes
with the land to the devisee; and their loss is in the nature of damage
done to the land. By analogy to the cases of covenants which run
with the land—such as covenants to repair—which pass with the re-
version to the heir or devisee, this action is maintainable. The breach
of covenant in those cases is a continuing breach where the cause of
action is continuing. In *King v. Jones*, 5 Taunt. 418 (E. C. L. R.
vol. 1), (b) an action was brought by the plaintiff, as the heir of his
father, against the defendant, as executor of Richard Griffith, upon a
covenant of the testator to do all lawful and reasonable acts for fur-
ther assurance, upon request; and it was held that the covenant was
one running with the land, and that the heir might recover. In *King-
don v. Nottle*, 1 Mau. & S. 355, it was held that an action by the
plaintiff, as executrix of Richard Kingdon, against the defendant, for
a breach of covenant to make a good title, could not be maintained
without showing some special damage to the testator in his lifetime,
or that the plaintiff claimed some interest in the property. Lord
Ellenborough, in the argument of the case, says, p. 362, "It has been
a sort of maxim in the law that an executor so far represents his tes-
tator as to be entitled to maintain an action in respect of all personal
contracts made with the testator and broken in his lifetime; but, from
Co. Lit. and the other authorities which have been cited, it should
seem that, in contracts relating to the freehold, the executor does not
represent his testator quite to that extent. And if the present action
could be maintained this inconvenience would certainly result from
*4] it, that *the executor, who could recover only nominal damages,
would thereby preclude the heir, who is the party actually dam-
nified, from recovering at all, for I am not aware of any case in which
an action has been holden to be maintainable by the heir after a former
recovery by the executor." In the present case the person damaged
is the devisee; he has the land, and if he wishes to sell it he may be
most seriously inconvenienced by the loss of the title deeds: it would
appear, therefore, that he is the person who ought to sue for the loss,

(a) The argument is reported by H. Holroyd, Esq.

(b) Affirmed in error, 4 Mau. & S. 188.

and not the executor. In Williams on Executors, p. 715, 5th ed., the author, in treating of actions upon covenants real, lays it down, "if such a covenant had been broken in the lifetime of the testator, or intestate, it should seem, according to the old authorities, that the rule was that the executor or administrator might sue upon it," and he cites a passage from Com. Dig. in support of such rule; but in p. 716 he adds, "this rule, however, has been directly qualified by the decision of *Kingdon v. Nottle*, followed by that of *King v. Jones*, in which cases it was held that where there are covenants real, that is, which run with the land, and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet, if the substantial damage has taken place since his death, the real representative and not the personal is the proper plaintiff."

Then the loss of the deeds, which, for aught that appears to the contrary, is through the defendant's own default, is no answer to an action of detinue. Williams, J., in his judgment in *Reeve v. Palmer*, 5 C. B. N. S. 84—91, says: "All the authorities, from the most ancient time, show that it is no answer to an action of detinue, where *a demand is made for the redelivery of the chattel, to say that the defendant is unable to comply with the demand by reason of his own breach of duty."

Hutton, contrâ.—The plaintiff, in order to maintain detinue, must show either a privity by bailment between himself and the defendant, or that he had a right to the possession of the deeds when he brought the action. Here there could be no contract of bailment between the plaintiff and the defendant, and, the loss having occurred in the lifetime of the testator, occurred before the plaintiff had any property in the deeds. *Reeve v. Palmer*, 5 C. B. N. S. 84—91 (E. C. L. R. vol. 94), only decides that the plea here would be no answer to the action if it had been brought by the plaintiff's testator. It is clear that the testator in his lifetime could have maintained an action against the defendant; and if he recovered judgment, the judgment would have been that he recover the deed or damages for its detention; and if the testator had sued in his lifetime, and then died, the damages would have gone to the executor. In Br. Ab. tit. *Sci. Fa.*, pl. 190, it is laid down: "Si home recover fait concernant enheritance per briefe de detinue, et damages de v. liv. si le fait soit de estre redelyver, et si le fait ne soit destre redelyver tunc, xx. liv. damages et devy, et per opinionem Curie lexecutors navera execution des damages devant que l'heire ad scire facias pur le fait, et distringas ad deliberandum factum, et si le viscount retourne quod charta perdita vel combusta est, donques lexecutors avera scire facias del damages et non ante, quod nota, et in plea real le heire avera execution del terre, recover per son auncstor, et les executors averont scire facias des damages et costes, quod nota." Suppose the *defendant had, in the testator's lifetime, [*8] wrongfully cut down a tree, the heir could not have brought an action for the wrong; and as, before the passing of the 3 & 4 W. 4, c. 42, s. 2, the executor could have brought no action for damage done to real estate, it follows that no one could have brought an action. It may be that, notwithstanding that statute, there is a class of cases where a wrong is committed in the testator's lifetime, for which no one can sue. The plea shows that the defendant never had possession of

the deeds after the plaintiff became entitled to them ; the plaintiff, therefore, cannot maintain this action ; if any action lies the executor is the proper person to sue : *Raymond v. Fitch*, 2 C. M. & R. 588, 5 Tyr. 985 ; *Ricketts v. Weaver*, 12 M. & W. 718 ; 1 Williams on Executors 719-20-21, 5th ed.

H. Cole was heard in reply.

Cur. adv. vult.

The following judgments were now read by *Wightman, J.*

WIGHTMAN, J.—This was a demurrer to a plea in detinue, and was argued before my brother Blackburn and myself on the 27th of November last ; and as we differ in opinion, it is not without great doubt, and after much consideration, that I have arrived at the conclusion that the plaintiff is entitled to judgment.

The declaration alleged that the defendant detained from the plaintiff his title deeds of certain messuages and land, whereby the plaintiff was prevented selling or mortgaging the same, as he would have otherwise done.

The defendant pleaded that the deeds were intrusted to and deposited with him by one Goodman, deceased, *and that the plaintiff claimed them as devisee under his will, and had no other interest in them, and that the detention of them was a loss of them by the defendant before the death of the said Goodman, deceased, and that the defendant never had the possession of them since the death of Goodman.

It is not alleged in the plea that the deeds have been destroyed, and it may be therefore assumed that they are still existing ; and as the property in them is by the devise vested in the plaintiff, he may maintain detinue, though he never had the actual possession, against any one who detains them ; as in the case of an heir at law suing in detinue for an heirloom : *Bro. Ab. Detinue*, pl. 30, 45. The loss of them would be no answer to an action by the original bailor unless it appeared by the plea that it was without any default of the defendant. Is then the loss of them as pleaded an answer to an action of detinue by the present plaintiff, who became the owner and entitled to the possession after the alleged loss by the defendant ? The deeds must be taken to be still existing, and ought to be in the possession of the defendant ready to be delivered to the plaintiff ; and he can hardly be allowed to set up his own default as an excuse for not having the possession of the plaintiff's property. Consistently with the defendant's plea, the deeds may have been found immediately after the death of the bailor ; and though they may not have actually come to the possession of the defendant since, he might have known where they were, and might have the possession of them if he pleased. The case would have been different had the plea stated that the deeds had been burnt or destroyed before the death of the bailor ; for if that had been the case, the plaintiff would never have *had any property in the deeds at all, and, consequently, could not be entitled to maintain an action to recover the possession, or damages for withholding it. As the case stands, if the plaintiff has judgment to recover the deeds in specie or their value, the defendant may, before execution, be able, as they are still existing, to comply with the first requirement of the judgment, and restore the deeds themselves. The action, it is to be observed, is not to recover damages for losing the deeds, but for the

detention of them. They must be taken upon these pleadings to be existing ; the plaintiff is the owner, and they are detained from him, without sufficient legal excuse, by the defendant, who ought to be in possession of them. If this action is not maintainable, I do not see how any action can be maintained by anybody, though the plaintiff has sustained great damage. The executor of the bailor cannot maintain detinue, for he has no property in the deeds, nor right to the possession, nor was there any request or refusal to deliver them in the bailor's lifetime ; nor can he maintain an action for losing them, as the personal estate sustained no damage.

I therefore think that the plea is bad, and does not answer the declaration, and that our judgment should be for the plaintiff.

BLACKBURN, J.—In this case there was a count in detinue for the plaintiff's title deeds in the usual form.

To this the defendant pleads, that the title deeds were deposited with him by one Goodman, since deceased ; and that the plaintiff's right to the deeds is as devisee of Goodman, and not otherwise ; that the defendant lost the deeds in the lifetime of Goodman, and has never had possession of them since his death.

*To this there is a demurrer.

The authorities, from those to be found in Brooke's Abridgment [*_9 tit. *Detinue*, down to Reeve v. Palmer, 5 C. B. N. S. 84 (E. C. L. R. vol. 94), agree that where the defendant in detinue had at one time possession of the plaintiff's goods, under such circumstances that he was bound to return them on demand, he cannot defend an action of detinue by pleading that in consequence of something amounting to a default on his part, as between him and the plaintiff, he, the defendant, has no longer possession of the goods, and, consequently, cannot comply with the demand ; and, therefore, as the plea in the present case does not allege that the goods were lost without any default on the defendant's part, it would be bad if it appeared that the defendant ever had the plaintiff's goods.

But the plea does not admit this : it shows that the defendant had those deeds before they became the plaintiff's, and that he lost them at a time when the plaintiff had nothing in them ; and, as it seems to me, he had no need to excuse that loss as against the plaintiff, inasmuch as the plaintiff was not then injured by the loss of what were not then his goods. It is true that the plaintiff has since then acquired by the devise the property in those deeds, just as he might have acquired property in any other goods by purchase ; and I agree that he has a right to maintain an action for any wrong to him, as owner of those deeds, committed subsequently to the time when they became his ; but, as a general rule, causes of action already accrued do not run with the property in goods or deeds. This plaintiff could maintain no action of trover or trespass for any act done to the deeds before they were his, nor could he maintain *in his own name any action [*_10 on the contract of bailment for the loss admitted by the demur- rer to have taken place before the plaintiff had any property in them. I quite agree that, having acquired the property in those deeds, he may maintain trover, trespass, or detinue for anything done to them subsequently to his acquiring that property. But I think, on this record, we cannot suppose that the defendant has had any control over

the deeds subsequent to the time when the plaintiff acquired the property, that is, after the death of Goodman. I think the general rule is, that no right of action already accrued is transferred with the property in chattels. No case has been cited, nor have I been able to find one, for saying that the action of detinue is an exception from this general rule.

It follows from this that no action for detinue can, in my opinion, be maintained, though an action by the executors on the contract of bailment would lie: whether, in that action, the damages would be substantial or not I need not now determine.

In my opinion, therefore, the judgment ought to be for the defendant.

I need not say that I express my opinion with diffidence, as it unfortunately does not agree with that of my brother Wightman. Still I think myself bound to express it.

The Court having consisted of only two Judges, and being equally divided in opinion, I shall withdraw my opinion, so that the judgment will be entered, in conformity with the opinion of the senior Judge, for the plaintiff. Judgment for the plaintiff.

*11] *SCOTT and others v. PILKINGTON and another. Jan. 28.

MUNROE and others v. PILKINGTON and another.

Action on foreign judgment.—Lex loci contractus.—Mistake of law.—Appeal.

1. In an action on a contract where the question at issue has no relation to the manner of performing the contract, or to the consequences of non-performance, and relates entirely to the effect of the transaction at the place where it was entered into, the liability of the defendant must be determined by the *lex loci contractus*.

2. Where an action is brought on a judgment obtained in a foreign Court, the pendency of an appeal in the foreign Court against that judgment is no bar to the action; although it may afford ground for the equitable interposition of the English Court in which the action is brought to prevent the possible abuse of its process, and on proper terms to stay execution.

3. Concessum, that the judgment of a foreign Court having jurisdiction over the subject-matter cannot be questioned here, on the ground that the foreign Court has mistaken the law of its own country, or has come, on the evidence, to an erroneous conclusion as to the facts.

4. In an action on a judgment obtained by the plaintiff against the defendant in the Supreme Court of New York, the defendant pleaded that the judgment was erroneous according to the law of New York, and was liable to be reversed, and that he was prosecuting proceedings in appeal, which were then pending; and he set out the record of the proceedings in the original suit there, by which it appeared that the cause had been referred by order of the Court, not to a private arbitrator selected by the parties, but to an officer of the Court directed to ascertain the facts, who found certain facts, with certain conclusion of law from them, and judgment was given accordingly in favour of the plaintiff; although the same conclusion would not have followed by the English law had the same facts been found to have occurred here: held, that the plea was no answer to the action.

IN the first of these actions the plaintiffs were W. B. Scott, R. H. Thorn and R. C. W. Moore, and the defendants were John Pilkington and Daniel Pilkington.

Declaration. For that the plaintiffs heretofore, to wit, in and by the Supreme Court of the city and county of New York, in the United States of America, by the consideration and judgment of the same

Court, recovered against the defendants the sum of *18,067 [*12 dollars and 97 cents, together with 565 dollars and 40 cents costs and disbursements, amounting in all to the sum of 18,633 dollars and 37 cents, which said judgment still remains in full force and effect, and not in anywise satisfied, reversed, or annulled; and the plaintiffs say that no execution hath as yet been obtained of or upon the said judgment, and that the said sum of 18,633 dollars and 37 cents is still wholly unpaid, and is of great value, to wit of the value of 3864*l.* 0*s.* 11*d.*; whereby an action hath accrued to the plaintiffs to demand and have of the defendants the said sum of 3864*l.* 0*s.* 11*d.*; yet the defendants have not paid the same, or any part thereof: and the plaintiffs claim 5000*l.*

Plea. The defendants say that the following is the record of the proceedings in the said action in the Supreme Court of the city and county of New York, in which the said judgment was obtained, and of the said judgment contained in the judgment roll now remaining among the records of the said court.

"New York Supreme Court.

"*William B. Scott, Robert H. Thorn and Richard C. W. Moore,*
against *John Pilkington and Daniel Pilkington.*

"Summons for money demand on contract, com. for ser.

"To the defendants above named.

"You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk in the city and county of New York, at the City Hall, in the City of New York, and to serve a copy of your answer to the said complaint on the subscribers, at their office, No. 56 Wall Street, in the city of New York, within 20 days after the service of *this summons on you, exclusive of the day of such service, and if you fail to answer the [*13] said complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of 21,462 dollars and 23 cents, with interest thereon, from the 19th August, 1856, besides the costs of this action. Dated New York, September 1, 1856.

"*MARTIN & SMITHS, Plaintiffs' attorneys*

"New York Supreme Court. City and County of New York.

"*William B. Scott, Robert H. Thorn and Richard C. W. Moore*
against *John Pilkington and Daniel Pilkington.*

"The above named plaintiffs, by Martin & Smiths, their attorneys, for their complaint against the above named defendants respectfully state that, at the several times hereinafter mentioned, the plaintiffs were, and still are, co-partners in business in the city of New York, under the name and style of William B. Scott & Co., and the defendants were, and still are, co-partners in business in Liverpool, England, in the kingdom of Great Britain, and elsewhere, under the name and style of Pilkington Brothers.

"That on or about 16th February, 1856, in the city of New York, the said defendants made and delivered to Fleming & Alden, a mercantile firm in said city, the certain letter of credit, authority, undertaking and promise, in writing, of them, the said defendants, of that date, in the words and figures following, that is to say.

"Messrs. Fleming & Alden, 94 Wall Street, New York.

"New York, 16th February, 1856.

"Gentlemen,

*14] "In reply to your communication made to me *this morning, respecting your drawing exchanges upon us, I would state that you have our authority to do so, and all such exchanges drawn upon us will be duly honoured and protected. This power, however, is subject to being withdrawn at any future time.

"Yours very truly,

DANIEL PILKINGTON, of and for the firm of

"Pilkington Brothers, Liverpool.

"And the plaintiffs further say, that after the making and delivery, as aforesaid, of the said letter of credit, the said Fleming & Alden, by virtue and in pursuance of the authority thereby conferred, and while the same was in full force, on or about 22d July, 1856, in the city of New York, drew their certain bill of exchange, in sets numbered 1st, 2d, and 3d, of that date, directed to the defendants at Liverpool aforesaid, and therein and thereby requested the defendants, 60 days after sight of either of said sets, the other two being unpaid, to pay in London, to the order of the plaintiffs, by their said firm style of William B. Scott & Co., the sum of 1000*l.* sterling, value received, and the said Fleming & Alden then and there offered the said bill of exchange for sale to the plaintiffs for the amount thereof, and a certain premium, according to the rate of premium then in favour of exchange on London, and to induce and persuade the plaintiffs to purchase such bill and other bills, to be drawn by the said Fleming & Alden upon the defendants, under and in pursuance of the said letter of credit, they the said Fleming & Alden then and there, and before that time, showed to and left on deposit with the plaintiffs the said letter of credit, and the plaintiffs became and were fully informed of the contents thereof, and upon the faith and credit thereof *15] agreed to purchase, *and thereupon then and there did purchase and receive of and from the said Fleming & Alden the said bill of exchange, and in consideration of the premises paid to the said Fleming & Alden therefor in moneys of the United States of America, the sum of 4822⁴²/₁₀₀ dollars, being a sum equal to the amount expressed in such bill and the premium of exchange aforesaid; and that the plaintiffs, by reason of the said several premises, thereby became and were, and still are, the holders and owners of the said bill of exchange, and as such entitled to have and demand of and from the defendants the acceptance of the said defendants in writing thereon, and due payment thereof by the defendants, according to their undertaking and promise in the letter of credit aforesaid.

"And the plaintiffs further say that afterwards, the sum of money in said bill expressed being unpaid, that is to say on the 6th August, 1856, they caused the same to be duly presented for acceptance at Liverpool aforesaid to the defendants, and acceptance thereof by the defendants to be then and there duly demanded; and that the defendants then and there failed and refused, and have hitherto failed and refused, to accept the said bill by writing their acceptance on the same or in any other way, to the wrong and injury of the plaintiffs, and contrary to the said promise in writing, by them the said defendants made and

delivered as aforesaid; by means whereof, the premium of exchange having meanwhile advanced, the plaintiffs have suffered loss and damage to the amount of 4866 $\frac{2}{3}$ dollars, lawful money of the United States of America.

"2d. The plaintiffs as another cause of action against the defendants further state that afterwards, on or about *12th August, [*16 1856, in the city of New York, the said letter of credit being in full force and the power thereby conferred being in nowise withdrawn, the said Fleming & Alden, by virtue and in pursuance thereof, drew their certain other bill of exchange in three sets, numbered 1st, 2d, and 3d, of that date, directed to the defendants at Liverpool aforesaid, and therein and thereby requested the defendants, 60 days after sight of either of said sets, the other two being unpaid, to pay in London, to the order of Messrs. Acker & Harris (then and there a mercantile firm in the city of New York), the sum of 1000*l.* sterling, value received, and that the said Fleming & Alden then and there offered the said bill of exchange for sale to the payees therein named, and as plaintiffs are informed and believe, to induce the said payees to purchase the same, then and before that time showed and caused the said letter of credit, then and before that time in possession of plaintiffs, to be shown to and read by the said Acker & Harris and the contents thereof so to be to them communicated, and that the said Acker & Harris, by reason of the premises and on the faith and credit of said letter of credit, as plaintiffs are informed and believe, then and there purchased and took the said bill of exchange of and from the said Fleming & Alden, and paid therefor, as plaintiffs are informed and believe, to the said Fleming & Alden the sum of 4822 $\frac{2}{3}$ dollars or about that amount, in lawful money of the United States of America, and otherwise, which said sum would have been the proper value of said bill of exchange in New York when duly accepted by the defendants according to their said promise and undertaking in that behalf in the said letter of credit contained.

"And the plaintiffs further say that afterwards and before [*17 the payment of the said bill, and before any acceptance thereof or presentment of the same for acceptance to the defendants, and while the said letter of credit was in full force and on deposit with the plaintiffs as in the first cause of action in this complaint mentioned, on or about 12th August, 1856, in the city of New York aforesaid, the said Acker & Harris endorsed the said last-mentioned bill of exchange and offered the same for sale to the plaintiffs; and thereupon the plaintiffs, relying on the faith and credit of the said letter of credit, and having due notice that the said bill had been drawn in pursuance thereof and by virtue of the power and authority thereby conferred, and that the same had been purchased by the said Acker & Harris upon the faith and credit thereof as aforesaid, purchased and received the said bill of exchange of and from the said Acker & Harris, and on the faith and credit of such letter of credit paid therefor to the said Acker & Harris the sum of 4822 $\frac{2}{3}$ dollars, money of the United States of America, which said sum would have been the proper value of the said bill of exchange in New York when accepted by the defendants according to their said promise and undertaking; by means whereof the plaintiffs became and were, and still are, the

holders and owners of the said bill of exchange, and as such entitled to have and demand of and from the defendants the acceptance of the said defendants in writing thereon, and due payment thereof by the defendants, according to their promise and undertaking in the letter of credit aforesaid.

" And the plaintiffs further say that afterwards, before payment of *18] the sum of money in said bill expressed, "that is to say on the 27th August, 1856, at Liverpool aforesaid, the plaintiffs caused the said bill of exchange to be duly presented for acceptance to the defendants, and acceptance thereof by the defendants to be duly demanded; and that the defendants then and there failed and refused, and have hitherto failed and refused, to accept the said bill by writing their acceptance on the same, or in any other way, to the wrong and injury of the plaintiffs, and contrary to the said promise and undertaking of them, the said defendants, in their letter of credit aforesaid; by means whereof, the premium of exchange having meanwhile advanced, the plaintiffs have suffered loss and damage in the other and further sum of 4866¹⁷/₃₃ dollars, lawful money of the United States of America.

" 3d. And the plaintiffs as another cause of action against the defendants, further state that afterwards, on or about the 19th August, 1856, in the city of New York, the said letter of credit being in full force and the power thereby conferred having been in nowise withdrawn, the said Fleming & Alden, by virtue and in pursuance thereof, drew their certain other bill of exchange in three sets, numbered 1st, 2d and 3d, of that date, directed to the defendants at Liverpool aforesaid, and therein and thereby requested the defendants, sixty days after sight of either of said sets, the other two being unpaid, to pay in London, to the order of the aforesaid Messrs. Acker & Harris (then and there a mercantile firm in the city of New York) the sum of 1000*l.* sterling, value received, and that the said Fleming & Alden then and there offered the said bill of exchange for sale to the payees therein named, upon the faith and credit of the said letter of credit *19] then in possession of *the plaintiffs, and at and before that time, as plaintiffs are informed and believe, caused by the said Fleming & Alden to be shown to and read by the said Acker & Harris, and the contents thereof to be communicated to them, as in the second cause of action in this complaint mentioned; and that the said Acker & Harris, by reason of the premises, and on the faith and credit of said letter of credit, as plaintiffs are informed and believe, then and there purchased and received the said last-mentioned bill of exchange of and from the said Fleming & Alden, and paid therefor to the said Fleming & Alden the sum of 4822¹⁷/₃₃ dollars, or about that amount, in lawful money of the United States of America, which said sum would have been the proper value of said bill of exchange in New York, when duly accepted by the defendants according to their said promise and undertaking in that behalf in the said letter of credit contained.

" And the plaintiffs further say that afterwards, and before the payment of the said bill, and before any acceptance thereof or presentation of the same for acceptance to the defendants, and while the said letter of credit was in full force, and on the deposit with the plain-

tiffs as in the first cause of action in this complaint mentioned, namely, on or about 19th August, 1856, in the city of New York aforesaid, the said Acker & Harris endorsed the said last-mentioned bill of exchange, and offered the same for sale to the plaintiffs; and thereupon the plaintiffs, relying upon the faith and credit of the said letter of credit, and having due notice that the said bill of exchange had been drawn in pursuance thereof, and by virtue of the power and authority thereby conferred, and that the same had been purchased by the [*20] *said Acker & Harris upon the faith and credit thereof as aforesaid, purchased and received the said bill of exchange of and from the said Acker & Harris; and on the faith and credit of the said letter of credit, paid therefor to the said Acker & Harris the sum of 4822⁷³/₁₀₀ dollars, lawful money of the United States of America, which said sum would have been the proper value of the said bill of exchange in New York when accepted by the defendants, according to their said promise and undertaking; by means whereof the plaintiffs became and were, and still are, the holders and owners of the said bill of exchange, and as such entitled to demand and have of and from the defendants the acceptance of the said defendants in writing thereon, according to their promise and undertaking in the letter of credit aforesaid.

" And the plaintiffs further say that afterwards, before payment of the sum of money in said bill expressed, that is to say, on 2d September 1856, at Liverpool aforesaid, the plaintiffs caused the said bill of exchange to be duly presented for acceptance to the defendants, and acceptance thereof by the defendants to be duly demanded; and that the defendants then and there failed and refused, and have hitherto failed and refused, to accept the said bill, by writing their acceptance on the same, or in any other way, to the wrong and injury of the plaintiffs, and contrary to the said promise and undertaking of them the said defendants in their letter of credit aforesaid; by means whereof, and of the rate of premium having meanwhile advanced, the plaintiffs have suffered loss and damage in the other and further sum of 4866⁶⁷/₁₀₀ dollars, lawful money of the United States of America.

"* And the plaintiffs further say that, by reason of the said [*21] several grievances, they have been deprived of the use and benefit of the said several bills of exchange, and of the acceptances of defendants thereon, and unable to negotiate the same, except upon their partnership credit; that the total value of the said bills of exchange, in the city of New York, if accepted by the defendants, as in duty bound, would have been 14,600⁰⁰/₁₀₀ dollars, and that, by the aforesaid grievances and the consequent deterioration of the commercial value of the said bills of exchange, they have suffered loss and damage to the amount last mentioned, which amount the plaintiffs claim in this action, and demand judgment against the said defendants for the said sum of 14,600⁰⁰/₁₀₀ dollars, with interest from the commencement of this action, besides costs.

" MARTIN & SMITHS, plaintiffs' attorneys.

City and county of New York, S. S.

" William B. Scott, one of the plaintiffs in the above entitled action, being duly sworn, says, that the foregoing complaint is true to his

knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

"W. B. SCOTT.

"Sworn to before me this 3d November, 1856.

"JOHN BISSELL, Commissioner of Deeds.

Supreme Court

John Pilkington & Daniel Pilkington,

ats

William B. Scott, Robert H. Thorn and Richard C. W. Moore.

"The above defendants, by Miller & Develin their attorneys, *22] answer the complaint of the above plaintiffs, *and say, that they admit that the said plaintiffs were and are copartners in business, and that the defendants were and are copartners, as stated in said complaint, but aver that the said defendants were, at the times mentioned in the said complaint, and are, copartners in Liverpool only, and not elsewhere.

"And these defendants, in answer to the first cause of action stated in said complaint, admit that, at or about the time mentioned in said first cause of action, they made and delivered to Fleming & Alden, named in said complaint the letter set out in said complaint. And these defendants, further answering said first cause of action on information and belief, admit that the said Fleming & Alden, on or about 22d July, 1856, in the city of New York, drew their certain bill of exchange in sets, and that the same is correctly set forth and described in said first cause of action; but these defendants deny that the said Fleming & Alden, by virtue or in pursuance of the authority conferred by said letter, or while the same was in force, drew said bill of exchange; but, on the contrary, these defendants aver that previously to the drawing of said bill, and to the said 22d July, 1856, these defendants had duly withdrawn, revoked, annulled, and determined any and every right, authority, power, or privilege of said Fleming & Alden given or conferred by said letter, and all right, authority, and power to draw the said bill of exchange, or any other bill of exchange, under or by virtue of said letter, or the making or delivery thereof to them, and had cancelled and put an end to the said letter, and every agreement and power therein contained.

*23] "And the said defendants, further answering, say they *are informed and believe, and therefore admit, that the said Fleming & Alden offered the said bill of exchange for sale as stated in the said first cause of action, but these defendants say, on like information and belief, that the said Fleming & Alden did not, for the purposes mentioned in the said complaint, or any of them, show to or leave in deposit with the said plaintiffs the said letter.

"And these defendants, further answering, say that they have not knowledge or information sufficient to form a belief as to whether or not the said plaintiffs were fully informed of the contents of said letter or any part thereof, or as to whether or not the said plaintiffs, on the credit or faith thereof, or for what motive, agreed to purchase, or as to whether or not they did purchase or receive the said bill of exchange, or as to whether or not, in consideration of the premises stated in said complaint, or any other consideration, they paid to Fleming & Alden therefor any sum of money whatever, or as to whether or not the said

plaintiffs were, or still are, the holders or owners of the said bill of exchange, and they deny that the said plaintiffs are entitled to have or demand of or from these defendants their acceptance, in writing or otherwise, on said bill, or payment thereof from these defendants.

" And these defendants admit the statements in the said cause of action contained in regard to the presentation of the said bill for acceptance at Liverpool, the time and demand thereof, and the refusal of these defendants to accept; but they deny that such refusal was to the wrong or injury of the said plaintiffs, or contrary to any promise of these defendants, but they say that they have not knowledge or information sufficient to form *a belief as to who caused the said [*24 bill to be presented for acceptance or acceptance to be demanded.

" And these defendants, further answering said cause of action, say that they have not knowledge or information sufficient to form a belief as to whether or not the premium of exchange had advanced as stated in said cause of action, or as to whether or not the plaintiffs have suffered loss or damage to any amount whatever.

" 2d. And these defendants, answering the second cause of action in said complaint contained, on information and belief, admit that the said Fleming & Alden, on or about the 12th August, 1856, in the city of New York, drew their certain other bill of exchange, in sets, and that the same is correctly described and set forth in the second cause of action; but these defendants deny that, at the time of the drawing of the said last-mentioned bill of exchange, the letter hereinbefore mentioned and in said complaint set forth, was in force, or that the said Fleming & Alden, by virtue or in pursuance of the said letter, drew the said last-mentioned bill of exchange, but, on the contrary, these defendants aver that, previously to the drawing of the said last-mentioned bill of exchange, these defendants had withdrawn, revoked, determined and annulled the said letter, and any and every right, authority, power and privilege of the said Fleming & Alden, given or conferred by said letter, and all right, authority and power to draw said bill of exchange, or any other bill of exchange, under or by virtue of said letter, or the making or delivery thereof, to them, and had cancelled and put an end to said letter, and every agreement and power therein contained.

" And the defendants further answering said second cause of action, on information and belief, say and admit *that the said Fleming & Alden offered the said last-mentioned bill of exchange for sale [*25 to Acker & Harris, the payees thereof; and these defendants say that, as they are informed and believe, the said Fleming & Alden did not at any time show said letter to said payees, or cause the same to be shown to or read by said payees, or the contents thereof to be to them communicated for any purpose whatever.

" And these defendants, further answering said second cause of action, say that they have not knowledge or information sufficient to form a belief as to whether or not the said Acker & Harris, by reason of the premises in said last-mentioned cause of action stated, or as to whether or not they, on the faith or credit of said letter, purchased or took the said last-mentioned bill of exchange, or as to whether or

not the said Acker & Harris paid therefor the sum of 4822²²/₁₀₀ dollars, or any other sum.

" And these defendants, further answering said second cause of action, say that they have not knowledge or information sufficient to form a belief as to whether or not at any time the said Acker & Harris endorsed the said last-mentioned bill of exchange, or offered the same for sale, or as to whether or not the plaintiffs relied on the faith or credit of the said letter, or had any notice that the said last-mentioned bill of exchange had been drawn in pursuance thereof, or by virtue of the power or authority thereby conferred, or that the same had been purchased by the said Acker & Harris upon the faith or credit thereof, or as to whether or not the said plaintiffs purchased or received the said bill of exchange of or from the said Acker & Harris, or as to whether or not the said plaintiffs, on the faith or credit of *26] the *said letter, paid therefor the sum of 4822²²/₁₀₀ dollars or any other sum, or as to whether or not the plaintiffs became, were, or are the holders or owners of said last-mentioned bill of exchange. And they deny that the said plaintiffs are entitled to have or demand of or from the defendants their acceptance, in writing or otherwise on, or payment of the said last-mentioned bill of exchange. And these defendants admit the presentation of said last-mentioned bill of exchange for acceptance, and the refusal of these defendants to accept the same; but they say that they have not knowledge or information sufficient to form a belief as to who caused the said last-mentioned bill of exchange to be presented for acceptance, or acceptance to be demanded; and they deny that such refusal was to the wrong or injury of said plaintiffs, or contrary to any promise of these defendants.

" And these defendants, further answering said second cause of action, say that they have not knowledge or information sufficient to form a belief as to whether or not the premium of exchange had advanced as stated in said complaint, or as to whether or not the plaintiffs have suffered loss or damage to any amount whatever.

" 3d. And these defendants, answering the third cause of action in said complaint contained on information and belief, admit that the said Fleming & Alden, on or about 19th August, 1856, in the city of New York, drew their certain other bill of exchange in sets, and that the same is correctly described and set forth in the said third cause of action; but these defendants deny that, at the time of the drawing of the said last-mentioned bill of exchange, the letter hereinbefore mentioned, and in such complaint set forth, was in force, or that the *27] said Fleming *& Alden, by virtue or in pursuance of said letter, drew the said last-mentioned bill of exchange; but, on the contrary, these defendants aver that, previously to the drawing of the said last-mentioned bill of exchange, these defendants had withdrawn, revoked, determined and annulled the said letter, and any and every right, authority, power and privilege of the said Fleming & Alden given or conferred by said letter, and all right, authority and power to draw the said bill of exchange, or any other bill of exchange, under or by virtue of said letter, or the making or delivery thereof to them, and had cancelled and put an end to said letter, and every agreement therein contained.

"And these defendants, further answering said third cause of action on information and belief, say and admit that the said Fleming & Alden offered the said last-mentioned bill of exchange for sale to Acker & Harris, the payees thereof; but these defendants say that, as they are informed and believe, the said Fleming & Alden did not at any time show said letter to said payees, nor cause the same to be shown to or received by the said payees, or the contents thereof to be to them communicated for any purpose whatever.

"And these defendants, further answering said third cause of action, say that they have not knowledge or information sufficient to form a belief as to whether or not the said Acker & Harris, by reason of the premises in said last mentioned cause of action stated, or as to whether or not they, on the faith or credit of the said letter, purchased or took the last-mentioned bill of exchange, or as to whether or not the said Acker & Harris paid therefor the sum of 4822²²/₁₀₀ dollars, or any other sum.

"And these defendants, further answering said third cause of action in the said complaint, say that they have not knowledge or information sufficient to form a belief as to whether or not at any time the said Acker & Harris endorsed the said last-mentioned bill of exchange, or offered the same for sale, or as to whether or not the plaintiffs relied on the faith or credit of said letter, or had any notice that the said last-mentioned bill of exchange had been drawn in pursuance thereof, or by virtue of the power or authority thereby conferred, or that the same had been purchased by the said Acker & Harris upon the faith or credit thereof, or as to whether or not the said plaintiffs purchased or received the said bill of exchange of or from said Acker & Harris, or as to whether or not the said plaintiffs, on the faith or credit of said letter, paid therefor the sum of 4822²²/₁₀₀ dollars, or any other sum; or as to whether or not the plaintiffs became, or were, or are the holders or owners of the said last-mentioned bill of exchange. And they deny that the said plaintiffs are entitled to have or demand of or from the defendants their acceptance, in writing or otherwise on, or payment of the said last-mentioned bill of exchange. And these defendants admit the presentation of the said last-mentioned bill of exchange for acceptance, and the refusal of these defendants to accept the same; but they say that they have not knowledge or information sufficient to form a belief as to who caused the said last-mentioned bill of exchange to be presented for acceptance, or acceptance to be demanded; and they deny that such refusal was to the wrong or injury of the said plaintiffs, or contrary to any promise of these defendants.

"And these defendants, further answering said third cause of action, say that they have not knowledge or information sufficient to form a belief as to whether or not the premium of exchange had advanced as stated in said last-mentioned cause of action, or as to whether or not the plaintiffs have suffered loss or damage to any amount whatever; but they aver that this action was commenced on 1st September, 1856, and that the said last-mentioned bill of exchange was not presented for acceptance until after said 1st September, 1856.

"And these defendants, for another and a separate and distinct answer to said complaint, and each and every of the said causes of

therein contained, say that they, these defendants, have never been copartners in business except in Liverpool in England in the kingdom of Great Britain, and that the contract contained in the letter set out in the said complaint, and bearing date 16th February, 1856, was, by the understanding of the parties and by its own terms, to be performed in said England and not elsewhere, and that, as these defendants are informed and believe, the construction and force thereof must be according to and governed by the law of said England.

" And these defendants, further answering the said complaint, say that, as they are informed and believe, the law of said England was at the time of the making and delivery of said letter and ever since has been, that, for a refusal by these defendants to accept any bill drawn under said letter, Fleming & Alden alone would have and could maintain an action against these defendants; but that no person or persons other than said Fleming & Alden could or can, for any cause whatever, have or maintain an action on said letter, by reason or means of anything therein contained, against these defendants.

*30] * " And these defendants, further answering the said complaint, say that, as they are informed and believe, the said letters and the contracts therein contained are, by the law of the said England, merely a chose in action and not negotiable, and by said law there is no privity of contract between the said plaintiffs and these defendants; and that, on a refusal by these defendants to accept the bills of exchange or any of them mentioned in said complaint, no cause of action existed or exists in favour of the above plaintiffs against the defendants.

" And these defendants, further answering the said complaint, say that, as to all matters and statements in said complaint contained not hereinbefore specifically admitted or denied, these defendants have not knowledge or information sufficient to form a belief.

" Wherefore these defendants pray that the said complaint may be dismissed with costs.

" MILLER & DEVELIN, defendants' attorneys, No. 53, Liby St., City and County of New York.

" John E. Develin, being duly sworn, says that he is one of the attorneys of the above defendants; and he further saith that he hath read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters stated on information and belief, and that as to those matters he believes it to be true.

" And this deponent further saith that the said defendants, and each of them, resides and is in England in the kingdom of Great Britain, and that neither of them is in the county of New York, and that this deponent and Jonathan Miller, the other attorney of defendants, reside in the said county of New York. And this deponent further saith

*31] that he has no personal knowledge of the *matters stated in the said answer; that the defence in the above entitled action is founded in part on written instruments, which are in the possession of this deponent; that he has had correspondence with the said defendants on the subject of the matters stated in said complaint and answer, and that they have stated to him the case in full as he verily believes: that another part of said defence is founded on the law of England,

and that he has consulted the English Reports and also English lawyers in regard to such law: and that the above are the grounds of his belief as to the truth of the matters in said answer, and the reasons why same is not verified by defendants or either of them.

"Signed, JOHN E. DEVELIN.

"Sworn to before me this 5th day of August, 1857.

"Signed, J. T. ROBIN, Commissioner of Deeds.

"Within is a copy of the answer of the defendants in the above entitled action.

"New York, 5th August, 1857.

"Miller & Develin, defendants' attorneys.

"To Martin & Smiths, Esquires, Nassau St.

"At a special term of the Supreme Court of the State of New York, held at the City Hall of the city of New York, on the 3d of August, 1859.

"Present, Hon. Daniel P. Ingraham, Justice.

"Wm. B. Scott and others *against* Daniel Pilkington and another.

"John Munroe and others *against* the same.

"On reading and filing the annexed consent and on motion of Martin & Smiths, plaintiffs' attorneys, it is ordered that the above entitled actions, and all the issues therein, be and the same are hereby referred to *Henry Nicholl Esquire, Counsellor at Law, as sole [*32 referee, to hear and decide the same. A copy.

"JOHN CLANEY, Clerk.

"Due service of the within order is hereby admitted.

"Dated, New York, August 3d, 1859. J. E. DEVELIN, defendants' attorney.

"New York Supreme Court.

"Wm. B. Scott et al. *against* John Pilkington and Daniel Pilkington.

"To the Supreme Court.

"I, Henry Nicholl, of the city of New York, to whom by an order made in this action on the 3d August, 1859, all the issues therein were referred to hear and determine the same, do report that I have been attended by the attorneys and counsel of the parties, plaintiffs and defendants in this action, and that, after having heard their respective allegations and proofs; I do find that, on or about 16th February, 1856, the defendants made and delivered to the firm of Fleming & Alden, of the city of New York, a paper writing in the words and figures following: Messrs. Fleming & Alden, 94 Wall Street, New York.—New York, 16th February, 1856. Gentlemen, In reply to your communication made to me this morning, respecting your drawing exchanges upon us, I would state that you have our authority to do so, and all such exchanges drawn upon us will be duly honoured and protected. This power, however, is subject to being withdrawn at any future time. Yours very truly, Daniel Pilkington, of and for the firm of Pilkington Brothers, Liverpool.

"That the said paper writing was made and executed in the city of New York by the defendant Daniel Pilkington, then in said city, for and on behalf of Pilkington Brothers, of Liverpool, England, composed of the *defendants in this action: that the said paper writing was so made by the said Daniel Pilkington, at the request [*33 of said Fleming & Alden, and for the purpose and with the intention

that such paper writing should be exhibited to such parties as might buy the bills of exchange which might thereafter be drawn by the said Fleming & Alden, in the said city of New York, on the said defendants, as evidence of the authority of the said Fleming & Alden to draw said bills of exchange.

"That afterwards the said paper writing was deposited by said Fleming & Alden with the plaintiffs, who were bankers in the city of New York, as evidence of the said authority of the said Fleming & Alden in the premises; and that thereupon the said Fleming & Alden, at the city of New York, drew the several bills of exchange in the pleadings in this action mentioned upon the said defendants; and which said bills of exchange were purchased by the said plaintiffs, at the city of New York, the said plaintiffs, upon such purchase relying upon the faith and credit of the said paper writing as evidence that the said Fleming & Alden were authorized to draw the said bills of exchange, and that the same would be duly accepted by the said defendants.

"That at the time of the drawing of the said bills of exchange, as well as of the purchase thereof by the plaintiffs, the authority contained in the said paper writing, so given by the said defendants, had not been in any manner revoked, withdrawn, or annulled.

"That the said bills of exchange were duly presented by the plaintiffs to the defendants for acceptance at Liverpool, and acceptance thereof in each case refused.

"That the first of said bills was so presented, and acceptance refused, on the 6th August, 1856. That on *that day the value [34] of the money in said bill of exchange expressed was, in the currency of the United States, the sum of 4836²⁷/₁₀₀ dollars.

"That the second of said bills was so presented, and acceptance refused, on the 27th August, 1856. That on that day the value of the money in the said last-mentioned bill of exchange expressed was, in the currency of the United States, the sum of 4836²⁷/₁₀₀ dollars.

"That the third of said bills was so presented, and acceptance refused, on the 2d September, 1856. That on that day the value of the money in said last-mentioned bill of exchange expressed was, in the currency of the United States, the sum of 4836³¹/₁₀₀ dollars.

"Upon the foregoing facts I find, as conclusions of law. First. That the said paper writing was a general letter of credit, operating as a promise and undertaking on the part of the defendants to and with every person who should, upon the faith and credit of the authority in said paper writing contained, purchase bills of exchange drawn by Fleming & Alden on the defendants, that said bills of exchange should be duly accepted by the said defendants. Second. That the said contract in its obligations and interpretation is to be governed by the laws of the state of New York, and not by the laws of Great Britain. Third. That the plaintiffs are entitled to recover as damages, by reason of the breaches by the said defendants of said contract in their refusing to accept the said bills of exchange, the value, in the currency of the United States, of each of the said bills of exchange at the said respective times of the presentation thereof for acceptance, with interest.

"I do therefore report that the plaintiffs are entitled to a judgment

in the sum of 18,067⁹⁷/₁₀₀ dollars, *(\$18,067⁷⁹/₁₀₀), being the aggregate amount of the said three bills, with interest as aforesaid: [*35 together with their costs.

"All of which is respectfully submitted.

Dated, New York, February 23, 1860.

HENRY NICHOLL, Referee.

"Due service of a copy of within Referee's Report is hereby admitted.

"March 6, 1860.

"JOHN E. DEVELIN, defendants' attorney.

"Supreme Court. City and county of New York. William R. Scott, Robert H. Thorn and Richard C. W. Moore, against John Pilkington and Daniel Pilkington.

"This action and all the issues thereon having, by an order of this Court, been referred to Henry Nicholl, Esq., as sole referee, to hear and decide the same, and the said action having been tried before said referee, and said referee having filed his report herein, whereby he finds that the plaintiffs are entitled to a judgment against the defendants, in the sum of 18,067⁹⁷/₁₀₀ dollars, and costs: Now, on motion of Martin and Smiths, attorneys for the plaintiffs, it is adjudged that the plaintiffs, William R. Scott, Robert H. Thorn and Richard C. W. Moore, recover of the defendants, John Pilkington and Daniel Pilkington, the said sum of 18,067⁹⁷/₁₀₀ dollars, together with 565⁴⁸/₁₀₀ dollars costs and disbursements, amounting in all to the sum of 18,637³⁷/₁₀₀ dollars.

"Amount and interest . . .	\$18,067.97
"Costs	565.40

\$18,633.87

"* Filed March 7, 1860, at 2 o'clock and 2 minutes.

"All of which we have caused by these presents to be exemplified, and the seal of the Supreme Court to be hereto affixed. [*36

"Witness Hon. J. Sutherland, Justice, at the city of New York, the 27th March, 1860, and of our independence the 84th.

"JOHN CLANEY, clerk."

And the defendants further say that the said judgment is erroneous, according to the law in force in the said city and state of New York, and is liable to be reversed by the Court of appeal in that behalf.

And the defendants further say that they the defendants had before the commencement of this action taken, and that they are duly prosecuting proceedings in the said Court of appeal, to obtain the reversal of the said judgment, which proceedings were at the time of the commencement of this action and still are pending in the said Court, and that the said Court has not yet given judgment thereon.

The plaintiffs took issue on this plea: and also replied, that according to the law in force in the said city and state of New York, and according to the practice of the said Supreme Court, and the said Court of appeal, and other Courts there in that behalf at the time of the said judgment, and still existing, execution on such judgments as in the declaration mentioned should not be stayed or delayed by proceedings in error or for reversal, as in the said plea of the defendants mentioned, without the special order of the Court or a Judge, unless

the person in whose name the proceedings were brought should have given security for the payment of the moneys recovered in and by [37] the *judgment, together with costs; yet the said defendants had not, nor had either of them or any other person, obtained any such leave as aforesaid, or given any such security as aforesaid, but had therein wholly failed and made default, and the plaintiffs were and always had been, notwithstanding such proceedings and appeal in the said plea of the defendants mentioned, according to the practice of the said Courts thereinbefore mentioned, entitled to the fruits of the said judgment, and to receive of and from the defendants the moneys thereby recovered, and to have execution for the same.

To this replication the defendants took issue, and also demurred.

The pleadings and questions in the second action were similar to those in the first.

The demurrers were argued in Easter Term, 1861, on the 16th April; before Cockburn, C. J., Crompton and Blackburn, JJ.(a)

Mellish, in support of the demurrers.—The causes in America ought to have been determined according to the English law. The rule is that the validity, nature, obligation and interpretation of a contract are to be determined by the law of the place where it is to be performed; Story Confl. Laws, § 280, 4th ed., Dig. Lib., 44, tit. 7, l. 21, Robinson *v.* Bland, 2 Burr. 1077, which, in the present case, was England, where the bills to be drawn by Fleming & Alden were to be made payable. If that be so, the record shows that the plaintiffs had no cause of action against the defendants, that there was no privity of [38] contract *between them, and that the plaintiffs' right to sue on these bills is against Fleming & Alden with whom his contract was made.

But even supposing this matter is to be determined by the American law, the decision of the Court there was erroneous, and proceedings in appeal are now pending. [COCKBURN, C. J.—How can we decide such a question? As to an appeal being pending, that cannot be the subject of a plea, however it might be for the equitable interference of this Court.] It is true that English Courts will not question the decisions of foreign Courts on the ground that they have mistaken their own law, or have come to a wrong conclusion on the facts; *Bank of Australasia v. Nias*, 16 Q. B. 717 (E. C. L. R. vol. 71); but they will do so in many other cases, instances of which are to be found in the books: *Rothschild v. Currie*, 1 Q. B. 48 (E. C. L. R. vol. 41); *Lewis v. Owen*, 4 B. & Ald. 654 (E. C. L. R. vol. 6); *Novelli v. Rossi*, 2 B. & Ad. 757 (E. C. L. R. vol. 22); *Reimers v. Druce*, 26 L. J. Ch. 196, 23 Beav. 145. *Nicholson v. Ricketts*, 29 L. J. Q. B. 55, 6 Jur. N. S. 442, is very like this case, and is an authority for the defendants. [CROMPTON, J.—*Ricardo v. Garcias*, 12 Cl. & F. 368, shows that we cannot go into the merits of the decision of a foreign Court. How can we review the judgment of an American Court on the question of privity or no privity?] BLACKBURN, J.—You are really asking us to say that the American Court was wrong in holding that there was evidence of a contract.]

Baylis, contrâ.—The case ought to be determined by the American law. The principle laid down by Story, in the passage adduced by

(a) The argument has been drawn up from the notes of Francis Ellis, Esq.

the other side (Conf. Laws, *§ 280), is stated too broadly, and is not borne out by the authorities cited in support of it. West-lake, in his Private Intern. Law, p. 156, § 167, lays down the following principles, deduced from a passage in Bartolus Com. in Cod. lib. 1, tit. 1, l. 1, "The litis ordinatio, the mode of procedure, depends on the law of the forum: the solemnities necessary to contracts, and the obligations which result at the time of contracting from the nature of the contract itself, depend on the law of the place of celebration: those which result from the combination of a posterior fact with the original contract depend on the law of that place where the posterior fact occurs: the non-performance of the contract by the omission or delay of one of the parties is to be regarded as such a posterior fact, and its juridical consequences deduced accordingly: if the parties stipulate for the performance of their contract at a certain place, it is by the law of that place, as that where the omission to perform is committed, that the obligations flowing from non-performance must be ascertained: and if they name no place of performance, or stipulate for several in the alternative, so as to leave the choice to the promissee, the obligations flowing from non-performance must be ascertained by the law of the forum, whether the promisor's domicile, or any one of the stipulated places of performance, have been chosen as the forum by the plaintiff." And at p. 195, § 208. "The jurisprudence which binds the contractor in the inception of his contract determines the nature and extent of the liabilities he incurs, and, if any of them are conditional, the circumstances in which they are to arise: and though those circumstances may afterwards occur within another jurisdiction, they can have no other legal effect than by relation to the contract, or, therefore, *than was traced out for them in the beginning by the law which then bound the contractor." In Tudor's Leading Mercantile Cases 238, also, in the notes to *Don v. Lippman*, 5 Cl. & F. 1, we find, "If by the law of the country where a contract is made, no personal obligation is created, but a right only is conferred of proceeding *in rem*, such contract will not be held to raise a personal obligation in the country where the contract is enforced:" for which he cites *Melan v. The Duke de Fitz James*, 1 Bos. & P. 138. [BLACKBURN, J.—In that case the contract was a French contract altogether.] *Trimbey v. Vignier*, 1 Bing. N. C. 151 (E. C. L. R. vol. 27), is also an authority in favour of the defendant. [BLACKBURN, J.—There the note sued on was made in France, and was both payable and endorsed there.]

Even if this question is to be determined by the English law, there is nothing on this record to negative the fact of privity between the parties. [BLACKBURN, J.—I do not think the record shows that there was privity.] The arbitrator has found there was; and the Court will not review his decision. In the cases cited by the other side, in which the Courts here have reviewed foreign judgments, the judgments of the foreign Courts were clearly wrong. If the English law is to prevail in this case, the parties would be bound by the award, seeing that it was made by consent: *Ashton v. Poynter*, 3 Dowl. 201.

[BLACKBURN, J.—That does not clearly appear from the record. CROMPTON, J.—Besides, if the declaration is bad, as showing no cause of action, the plaintiff cannot recover.]

*41] *Mellish was heard in reply. *Cur. adv. vult.*
The judgment of the Court was now delivered by

COCKBURN, C. J.—In each of these cases the same question arises.

The plaintiff sues upon a judgment obtained by him against the defendant in the Supreme Court of the county and city of New York.

The defendant in his plea sets out the record of the judgment at length, and concludes with an averment that the judgment is erroneous according to the law of New York, and is liable to be reversed, and that the defendant is prosecuting proceedings in appeal which are now pending. As far as regards this part of the plea, we expressed our opinion, in the course of the argument, that though the pendency of an appeal in the foreign Court might afford ground for the equitable interposition of this Court to prevent the possible abuse of its process, and on proper terms to stay execution in the action, it could not be a bar to the action itself.

A question of greater difficulty arises on the contention of the defendant, that on the face of the judgment of the Court of New York, as set forth on the record, there appears to be such error that the judgment could not be enforced here. It was not denied that, since the decision in the case of *The Bank of Australasia v. Nias*, 16 Q. B. 717, we were bound to hold that a judgment of a foreign Court, having jurisdiction over the subject-matter, could not be questioned on the ground that the foreign Court had mistaken their own law, or had

*42] come on the *evidence to an erroneous conclusion as to the facts; but it was contended, that in the present case the record of the judgment showed that the Court of New York ought to have decided the case before them according to English law, and that they had either disregarded the comity of nations by refusing to apply the English law, or erred in their view of the English law; and that when either of these alternatives appeared on the face of a foreign judgment, such judgment ought not to be enforced in this country. It is not, in our view of the case, necessary to decide how far these objections would prevail if they were founded in fact; and, as the question how far a foreign judgment may be examined is one of admitted difficulty, we do not desire to express any opinion upon it further than may be necessary to decide the present case.

In the present case, construing the record of the court of New York in the way most favourable to the defendants, we find there that the cause was referred by order of the Court. We do not understand the referee to have been a private arbitrator selected by the parties, but an officer of the Court directed to ascertain the facts. We find on the record that this referee reports that one of the defendants being in New York, wrote and delivered to Messrs. Fleming & Alden a letter of credit, in the following terms: "Messrs. Fleming & Alden, 94 Wall Street, New York.—New York, 16th February, 1856. Gentlemen, In reply to your communication made to me this morning, respecting your drawing exchanges upon us, I would state that you have our authority to do so, and all such exchanges drawn upon us will be duly honoured and protected. This power, however, is subject to being withdrawn at any future time. Yours very truly, Daniel Pil-

*43] kington, of and for the firm of *Pilkington Brothers, Liver-
pool." The referee reports that this letter was delivered in New

York by Daniel Pilkington, for the purpose and with the intention that it should be exhibited to the persons who might buy the bills of exchange which might be drawn by Fleming & Alden, in New York, on Pilkington Brothers in Liverpool, as evidence of their authority to draw such bills: that the plaintiffs in each action did buy bills so drawn, but acceptance thereof was refused by Pilkington Brothers in Liverpool. On these facts the referee finds, as a conclusion of law, that the letter "operated as a promise and undertaking on the part of the defendants to and with every person who should, upon the faith and credit of the authority in said paper writing contained, purchase bills of exchange drawn by Fleming & Alden on the defendants, that said bills of exchange should be duly accepted by the said defendants."

It may be conceded, in favour of the defendants, that if in a case before us the same facts which are stated to have occurred at New York had been stated to have occurred in London, we should not have agreed in this conclusion of law, nor have found that there was any privity of contract between the defendants and the purchasers of the bills of exchange; but the law of New York, as stated by the referee, having been adopted by the New York Court, we must, for the present purpose, take the law of that place to be as represented; and this brings us to the point as to which law is to prevail on the question as to the liability of the defendants—it being contended, on their part, that as the thing contracted for, namely, the acceptance of the bills, was to be performed in this country, the law of England, as that of the place of performance, ought to prevail.

*We are of a contrary opinion, it appearing to us that the question of the defendants' liability must be determined by the ^[*44]lex loci contractūs.

The question at issue has no relation to the manner of performing the contract, or to the consequences of non-performance. It relates entirely to the effect of the transaction at New York, and the document signed there by one of the defendants on behalf of the rest (his authority to bind the partnership not being called in question), in creating a liability in the defendants to the purchasers of the bills, which by the document the defendants were bound to accept in favour of Messrs. Fleming & Alden. Now, the transaction having taken place at New York, and the document in question having been executed there, and having been intended to operate there (the purpose of the defendants themselves having been, as stated by the referee, that the letter containing the contract with Messrs. Fleming & Alden should be exhibited by them to enable them to get rid of the bills), we are of opinion that the effect of the circumstances in question in creating a liability on the part of the defendants to the buyers of the bills must depend on the law of New York. The Court of New York having full jurisdiction over the subject-matter, have decided that the effect of the transaction in question is to establish a contract between the defendants and the plaintiffs, the purchasers of bills drawn by Fleming & Alden on the defendants, in conformity with the authority given by the letter of Daniel Pilkington, and not accepted by the defendants. For such we must take to be the effect of the Court having adopted the view of their officer in giving judgment in

favour of the plaintiff. Upon what grounds the judgment of the [American Court *proceeded—whether on the ground that the delivery of the letter to Fleming & Alden for the purpose of its being exhibited to third parties to induce the latter to buy the bills gave Fleming & Alden authority to bind the defendants to the buyers—or whether on the ground that the exhibition of such a document constituted a direct and immediate contract with those who purchased bills on the faith of the defendants undertaking to accept—is a question on which it is unnecessary to speculate. It is enough that, being satisfied that the question of the defendants' liability must be determined by the *lex loci* of the contract, we have the decision of a local Court of competent jurisdiction as to what that law is. Our judgment must therefore be in favour of the plaintiffs.

Judgment for the plaintiffs.

I. The opinions which English judges have entertained, at different periods, of the conclusiveness which was to be attributed to foreign judgments, afford an illustration of the fluctuation to which the best balanced minds are subject. It was at first determined that the sentences of foreign courts were to be received with credit until reversed by competent courts of the country in which they had been pronounced. The language of Lords Nottingham and Hardwicke (*Story's Conf. of Laws*, § 604) is as decided as that of Vattel, who says: “*L'administration de la justice exige nécessairement que toute sentence définitive, prononcée régulièrement, soit tenue pour juste ou exécutée comme telle . . . Entreprendre d'examiner la justice d'une sentence définitive, c'est attaquer la juridiction de celui qui l'a rendue:*” vol. 2, § 54. Subsequently a reaction against the advanced views of the earlier judges set in, and it has only been within a period embraced by the recollection of the present generation of practitioners that the question may be said to have been decided in favour of the conclusiveness of foreign judgments. The intermediate decisions have been reviewed by the late Jno. W. Smith, in his *Leading Cases*, vol. 2, 448–451, and it is only necessary to consider the recent cases, which have established

the doctrine upon a permanent basis. The point was directly presented for adjudication in *The Bank of Australia v. Nias*, to the Court of Queen's Bench, in the year 1851. There, in an action brought in England against an individual stockholder of the Bank of Australia upon a colonial judgment which had been obtained after service of process upon an officer of the institution, it was objected that the defendant had not been personally served with notice, and that the promises upon which the judgment had been recovered were obtained by fraud. Alluding to the statute which made service upon an officer equivalent to service upon the individual stockholders, Lord Campbell, C. J., said: “The colonial legislature, we think, clearly had authority to pass an act regulating the procedure by which the contracts of the bank should be enforced in the courts of the colony, nor is there anything repugnant to the law of England, or to the principles of national justice, in enacting that actions on such contracts, instead of being brought individually against all the shareholders in the company, should be brought against the chairman whom they have appointed to represent them.” And in reference to the main allegation of fraud, that the promises upon which the original action was brought were

not made by the company, and that those promises were obtained by the fraud and covin of the plaintiffs, he continued: "Doubtless it is open to the defendant to show that the foreign court had not jurisdiction of the subject-matter of the suit, or that he never was summoned to answer, and had no opportunity of making his defence, or that the judgment was fraudulently obtained. Perhaps it was in contemplation of these modes in which a foreign judgment may be impeached that it has sometimes been said to be only *prima facie* evidence, and we do not think there would be any advantage in going over the authorities seriatim, attempting either to reconcile them or to contrast them. It may be enough to say that the dicta against retrying the cause are quite as strong as those in favour of this proceeding; and being left without any express decision, now that the question must be expressly decided, we must look to principle and expediency. The pleas demurred to might have been pleaded, and, if there be any foundation for them, they ought to have been pleaded in the original action. They must now be taken to have been in due manner decided against the defendant. How far it would be permitted to a defendant to impeach the competency, or the integrity, of a foreign court, from which there was no appeal, it is unnecessary here to inquire. * * Although (the judgment be) perfectly regular and just, it may be set aside if the same questions are again to be submitted to a jury. Although the *onus probandi* is now to be shifted to the defendant, he is to be at liberty to adduce new witnesses, whom he may suborn, to prove that the company never made the promises which were the foundation of the judgment, or that these promises were obtained by the fraud and covin of the plaintiffs. The do-

cuments by which the original cause of action was established in a distant quarter of the globe may be lost or not forthcoming; and the witnesses who truly swore to it may be dead or absent. * * Is it to be said that the peril to the plaintiffs may be obviated by establishing a rule that the cause shall be retried upon the very evidence given in the court below, the jury acting as a court of appeal? But there is no authority for this limitation of inquiry; and these pleas must lead to a new trial, not to an appeal, upon the merits of the judgment which has been pronounced. If it were to be merely an appeal, how is the same evidence to be laid before a jury? and how are the incidental questions of law which must arise to be disposed of? If the judgment was given by a court in a foreign country, or in a court of one of our colonies governed by foreign law, how is the cause to be retried at *Nisi Prius*?" 71 E. C. L. (1851) 717.

The mode in which service is effected is regulated by the municipal law of the country in which the judgment is rendered, and this is assumed to be adequate in the country where the judgment is sued upon. In *Becquet v. McCarthy* the defendant had resided in Mauritius prior to the institution of suit, but was absent from the island at that period, and process was served upon the procureur general, who was required by the French colonial law to take care of the interests of absent parties. In a suit upon the judgment in England it was objected that the colonial court had acquired no jurisdiction, but the objection was overruled, as it was to be presumed that the officer had discharged the duty intrusted to him: 22 E. C. L. 951. And it is not necessary that the declaration in debt on a judgment should contain an averment that the court had juris-

diction. This fact is inferred, as the judgment is presumed to be correct, until it is controverted by a plea: *Robertson v. Struth*, 48 E. C. L. 941.

The doctrine advanced with such distinctness by Lord Campbell has been fully maintained by the subsequent cases. In *Vanquelin v. Bouard*, bills of exchange which were drawn at Orleans were accepted in Paris. The endorsee recovered judgment jointly against the drawer and the acceptor. The drawer subsequently died, and his wife paid the judgment, and took an assignment of the judgment roll. She also revived the judgment in her favour against the acceptor. In an action brought by her in England against the acceptor, he objected that the original judgment was obtained by default, and would be set aside on his entering an appearance; that the judgment was not final; that the court did not have jurisdiction, as he was not a "trader;" that the acceptances were without consideration, and were given for the deceased's security and accommodation, and that the original debt had been discharged by payment to the deceased. It was nevertheless held that the judgment was valid until set aside in France, and that objections could not be raised in England: 109 E. C. L. (1863) 341 c.

In the principal case Pilkington, whilst at New York, gave a letter of credit to Fleming & Alden, by which he authorized them to draw upon his firm in Liverpool. The plaintiffs, relying upon this authority, bought several bills drawn by Fleming & Alden upon the defendants, who, however, refused to accept the drafts. The plaintiffs recovered judgment against them in the Supreme Court of New York for the amount of the drafts. In an action brought in England upon this judgment the defendants objected that the law of England should govern

the contract, which was to be performed in England, and that by the English law they were not liable, as there existed no privity of contract between them and the purchasers of the drafts; that the court of New York had mistaken their own law, which agreed on this point with the law of England, and that an appeal was pending from their decision. C. J. Cockburn, delivering the opinion of the Queen's Bench, decided that the American law prevailed, which fact established the jurisdiction of the New York court, and that their decision must be treated as conclusive upon the parties, and as a declaration of New York law until reversed.

The result of the recent English decisions establishes the principle, which has been struggling for recognition during a century, that a foreign judgment is conclusive upon the merits involved in the controversy, and merges the cause of action in the transcendent dignity of its record. It is needless to state that judicial writers of eminence, with minds untangled in the intricacy of details, and undwarfed by routine, have given an extended range to their reflections upon this subject, and unite in advocating the adoption of this principle: 2 Kent Com. 118(3); Story Conf. of Laws, ch. 15; Eq. Juris. § 1570-84; 2 Sm. L. C. 449. Judge Redfield recapitulates the ground reclaimed:—"There has been a considerable controversy, extending over a long period, in regard to the precise effect of the adjudication of a foreign court, in determining the law of the place where rendered. It has been often said that such foreign judgment is only *prima facie* evidence, either of the law or the facts implied in such judgment. This has been claimed to be the established rule in many of the continental countries of Europe. But the Eng-

lish law certainly has been long evidently tending to a more reasonable conclusion; and the present decision (in allusion to *Doglioni v. Crispin*, subsequently affirmed in the House of Lords on appeal, 2 L. R., H. of L. 301. The point involved in that case, however, was the *status* of a party, which was determined by the law of his domicile) seems to recognise the rule as clearly established, that such foreign law is conclusively settled by the decision of the foreign court. That being conceded, there is no reason why the judgments of the foreign tribunals should not be equally conclusive in regard to the facts upon which they are founded. Thus it must result that all foreign judgments will be held conclusive, the same as a domestic judgment (the jurisdiction both of the parties and the subject-matter being clearly established), unless impeached for fraud or mistake. The record of the foreign court is not indeed conclusive, as a matter of evidence; that is a matter resting in *paix*, and to be determined as a matter of fact upon the evidence; but being satisfactorily proved, the contract resulting from the adjudication of the foreign court is equally conclusive with that of any domestic court, both as to the law and the fact of that case. And in this respect it will make no difference whether the judgment in the foreign forum were rendered by a court of last resort or not. It is equally conclusive upon the parties, and equally a merger of the subject-matter in the one case as in the other:” 4 Am. Law Reg. (N. S. 1864) 8.

The rule that a judgment cannot be collaterally impeached, which originated with domestic, and now extends and applies to foreign judgments as well, has become absolute, and the law has advanced one stage in the progress of simplification. There remains but one

step in advance to be taken, in order to make the assimilation between the two classes of judgments complete. Nor is this a great stride; it is only affording an increased facility in aid of a judgment which has already been recognised as a finality. The proposition is to allow execution to issue immediately upon the foreign judgment. The passage cited from Vattel shows that it is no novelty, as it was sanctioned by his great authority, and met with Story's approval: Conf. of Laws, § 618. It is at the present moment the law of Holland. In the *Revue de Droit International*, 1 Part. 1869, p. 82, Professor Affer, of Amsterdam, compares the laws of the several European states upon this point, and advocates the adoption of the proposition in furtherance of international comity. There would be no practical difficulty in acting upon the suggestion, as the custom of transferring judgments from one country to another by filing a certified transcript of the record, has familiarized practitioners with a method of carrying out the plan: Carpenter *v. Simmons*, 1 Robertson (N. Y. 1863) 360; Cannon *v. Cooper*, 39 Miss. (1861) 784; Statute of Pa., April 16th 1840.

The Constitution of the United States declares that “full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.” Art. IV. § 1. In pursuance of the authority conferred upon it, Congress passed an act which contained provisions for the authentication of the records and judicial proceedings of the state courts, and also a declaration that “the records and judicial proceedings, authenticated as aforesaid, shall have such faith and

credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Act May 26th 1790, ch. 11.

The framers of the Constitution evidently intended to clear up the obscurity which hung at that time over this point, by an authoritative declaration of inter-state comity. They furnished an example of a judicial interchange of civility which other states might well imitate, and the language which they employed was adequate to express the sentiment of courtesy which they entertained. It is remarkable that the object they had in view has been frustrated by a perverse interpretation of the provisions which they introduced. Instead of enlarging the scope of judicial intercommunication between the different states of the Union, the effect of the construction put upon these provisions has been to narrow the interchange of respect and consideration. To judge from a review of the decisions, one would infer the existence of a greater degree of jealousy between the courts of sister states than between foreign states: 2 Am. Lead. Cas. 778-820. For at the present time international law is decidedly more liberal in its recognition of the conclusiveness of foreign judgments, than is the constitutional law of the United States. It is, however, just to remark, that the recent cases evince a disposition of freedom from the exclusiveness which marked the earlier decisions, and the prospect now seems fair for placing the inter-state law upon the advanced ground occupied by international law as interpreted by the judges of England. Thus the judgment is conclusive upon the merits involved in the controversy: Walton *v.* Sugg, Phillips's Law (N. C. 1867) 98; Hockaday *v.* Skeggs, 18 La. An. (1866) 680. It

merges the cause of action in the same manner as if it were a domestic judgment: Howell *v.* Shands, 35 Geo. (1866) 66; Barnes *v.* Gibbs, 2 Vroom (N. J. 1865) 318; Baxley *v.* Linah, 4 Harris (Pa. 1851) 241; Hogg *v.* Charlton, 1 Cas. (Pa. 1855) 200. It cannot be disputed collaterally upon the jurisdictional facts which it recites: Cannon *v.* Cooper, 39 Miss. (1861) 784; Latrielle *v.* Dorleque, 35 Mo. (1864) 233; Johnston *v.* Kerkhoff, 35 Id. 291; Potter *v.* Merchants' Bank, 1 Tiff. (N. Y. 1864) 653; and when it fails to recite such facts they are presumed: Dunbar *v.* Hallowell, 34 Ill. (1864) 168; Finneran *v.* Leonard, 7 Allen (Mass. 1863) 54. The jurisdiction of the court which rendered the judgment is a question to be determined not by constitutional but by international law: Price *v.* Hickok, 39 Vt. (1866) 292, *contra*; Troy Bank *v.* Lauman, C. C. MS., April 19th 1857, which pronounced Act of Assembly Pennsylvania, April 14th 1851, requiring personal service upon defendant in the state where judgment was rendered to appear on the record, and to be open to investigation, unconstitutional upon the ground that it was an attempt to exercise the power delegated to the Congress of the United States.

II. The declaration which was made in the principal case of the English law in reference to the supposed absence of privity between the purchaser of a draft in reliance upon a letter of credit, and the writer who had given the letter, has been recalled, and it is now announced that a privity of contract does exist between the parties, which creates an equitable if not a legal liability: In re Agra & Masterman's Bank, L. R. 2 Ch. Ap. (1867) 391; Maitland *v.* The Chartered Mercantile Bank of India, London & China, 39 L. J. R. Ch. (1869) 368.

EVANS v. JONES. Jan. 28.

Resealing writ of summons.—Statute of Limitations.—Holidays.

The last day for resealing a writ of summons, so as to save the Statute of Limitations, expired on Saturday the 28th December, within the Christmas holidays. A party who attended at the office on that day for the purpose found it shut, and the officer having refused to reseal the writ on the following Monday, the 30th, the Court refused to order him to do it afterwards, *nunc pro tunc*.

THE WRIT OF SUMMONS in this action was issued in July, 1854, and had been regularly continued until 29th June, 1861, so that the Statute of Limitations would run out on the 29th December, 1861, unless the writ were further continued. For this purpose a clerk of the plaintiff's attorney attended at the office on Saturday, the 28th December, within the Christmas holidays, and found it closed. On Monday, the 30th, *he again attended at the office and found it [*_46 open, but the officer refused to reseal the writ unless by order of a Judge. Application was accordingly made to Mellor, J., for an order directing the officer to reseal the writ *nunc pro tunc*, who refused to interfere, and referred the matter to the Court.

J. Thompson moved for a rule accordingly.—The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 11), allows the plaintiff six months to renew his writ, and although he applied within that time the officer refused to reseal it. [CROMPTON, J.—The plaintiff, not the officer, was the party in default. As the plaintiff could not have his writ resealed on the last day of the six months, in consequence of its falling on a Sunday, he ought to have applied at the office the day before, and that day was a dies non. MELLOR, J.—When this matter was before me, the case of Nazer v. Wade, 1 B. & S. 728, 31 L. J. Q. B. 5, was referred to as an authority against you.] That case is distinguishable, for there the time had run out before the application was made. Under the old practice, writs were sealed on holidays on payment of an extra fee: Martin v. Bold, 7 Taunt. 182 (E. C. L. R. vol. 2). [CROMPTON, J.—If you had induced the officer to reseal the writ on the 28th December, it would have been well enough.] The statute should have an equitable construction, as appears by Anonymous, 24 L. J. Q. B. 23, 18 Jur. 1104, and Anonymous, 24 L. J. C. P. 1.(a) [CROMPTON, J.—I do not know what you mean by equitable construction. If the not resealing this writ had been the fault of one of our officers, we should order him to do it *nunc pro tunc*. But here the application was made at a time [*_47 when the officer was not bound to be at his office; and the case is the same as if it had been made on the last day allowed by law at an hour when the office was closed.] Rule refused.

(a) S. C. nom. Black v. Green, 15 C. B. 262 (E. C. L. R. vol. 80).

CHAUVIN v. ALEXANDER. Jan. 28.

Privilege from arrest.—Insolvent Debtors Court.

On the final hearing, by the Insolvent Debtors Court, of the case of a party who had petitioned it for relief, the case was adjourned sine die, and protection refused. On quitting the Court, the insolvent was arrested on a ca. sa.: held, that he was privileged from arrest.

THE defendant had petitioned the Insolvent Debtors Court for relief, and obtained protection in the usual way; but when his case came on for final hearing the Commissioner adjourned it sine die, and refused all further protection. On quitting the Court the defendant was arrested on a ca. sa. An application was then made to a Judge at chambers to discharge him, on the ground that, being in attendance on a tribunal at the time when he was taken into custody, he was privileged from arrest. WIGHTMAN, J.—having refused to interfere, *J. O. Griffits* obtained a rule accordingly, citing 1 Chitt. Archb. Pr. 719–20, 9th ed.

J. Brown showed cause.—This was not a proceeding in bankruptcy, where the defendant would be privileged, but was proceeding in the Insolvent Debtors Court, which is distinguishable in this, that the former is a hostile proceeding taken against the party by his [48] *creditors, whereas in insolvency the court is put in motion by the party's own act. The practice at Chambers is to refuse to discharge a party under these circumstances. The privilege is that of the Court, not of the party. [He cited *Magnay v. Burt*, 5 Q. B. 381 (E. C. L. R. vol. 48), and the cases there cited; and *Ex parte Cobbett*, 7 E. & B. 955 (E. C. L. R. vol. 90).]

J. O. Griffits, who appeared to support the rule, was not called on.

COCKBURN, C. J.—We all think that a man who petitions the Insolvent Debtors Court for relief is in the same position as a person attending any other Court of justice. Whatever may be the practice at Chambers on the subject before us, the question has never yet presented itself to a full Court, and we have no doubt that, on principle, the privilege should be allowed.

CROMPTON, J.—The Insolvent Debtors Court is equivalent to a Court of justice within the rule of law, which exempts from arrest every witness attending it, eundo, morando, et redeundo. It is no answer to say that the Insolvent Debtors Court has refused to give the party a protection against his creditors; their having refused to do so does not make him a general outlaw. It would be very dangerous to interfere with the principle I have stated, and, as to the alleged practice at Judges' chambers, I never heard of it.

MELLOR, J., concurred.

Rule absolute.

•WHITTLE, Appellant, FRANKLAND, Respondent. Jan. 25. [*49]

Master and servant.—Agreement.—4 G. 4, c. 34, s. 3.—Information.—Variance.—11 & 12 Vict. c. 43, s. 1.

1. A workman entered into an agreement with a coal company to serve them as a collier, in consideration of wages to be paid to him fortnightly; and the Company, in consideration of such service, agreed that he should not be discharged without twenty-eight days' notice in writing, unless in the case of misconduct: held, that this contract necessarily implied an obligation on the part of the master to find work for the servant, and to pay him wages every fortnight; and, consequently, was not bad for want of mutuality.

2. An information under the 4 G. 4, c. 34, s. 3, described the defendant as having contracted to serve "T. B. and his partners." At the hearing it appeared that the contract of service was between the defendant and "T. B. on behalf of himself and his partners, constituting The R. M. & H. Coal Company (Limited):" held, that this variance, if it were one, was cured by the 11 & 12 Vict. c. 43, s. 1.

THIS was a case stated under the 20 & 21 Vict. c. 43, by justices in petty sessions at Rotherham, in the West Riding of the county of York.

The following information was laid by R. J. Frankland, the respondent, agent to Thomas Bolland and his partners, against John Whittle, the appellant.

"Information and complaint of R. J. Frankland, of Masborough, in the West Riding of the county of York, agent to Thomas Bolland and his partners, of Masborough, in the said West Riding, coal-owners, taken, &c., that John Whittle, of Attercliffe, in the said West Riding, miner, on the 1st December, 1860, at the Holmes Colliery, in the said West Riding, did contract with the said Thomas Bolland and others to serve the said Thomas Bolland and his partners in the capacity and employment of a miner until he should have given or received from the said Thomas Bolland and his partners one month's notice to leave his said service, and until such notice should have fully *expired, [*50] at and for certain wages; and the said John Whittle did afterwards duly enter into his said service, according to the said contract; and the said John Whittle afterwards, and before the term of his said contract was completed, to wit, on the 13th February, 1861, at the Holmes Colliery, in the said West Riding, was, in the execution of the said contract, and otherwise respecting the same, guilty of a certain misconduct and misdemeanour, in this, to wit, that he did then and there, and before the term of his said contract was completed, unlawfully absent himself from his said service without leave or lawful excuse, contrary to the form of the statute, &c."

The justices convicted the appellant of the said offence, and adjudged him to be committed for one month's imprisonment, with hard labour.

At the hearing of the information it was proved by the respondent that the appellant had entered into the following agreement with Thomas Bolland, on behalf of himself and partners, constituting The Rotherham, Masborough and Holmes Coal Company (Limited).

"Memorandum of agreement, made the 1st day of December, 1860, between John Whittle, of Attercliffe, in the county of York, collier (hereinafter called 'the workman'), of the one part, and Thomas Bolland, of Kirby Fleetham Hall, in the said county of York, on behalf of himself and his partners, constituting The Rotherham, Masborough and Holmes Coal Company (Limited), carrying on business at Brins-

worth and Kimberworth, in the said county, as colliery proprietors, of the other part; whereby the said workman, in consideration of wages to be paid to him fortnightly by the said Rotherham, Mas-
*51] borough and Holmes Coal Company *(Limited), doth contract and agree with the said Company to work for and serve the said Company faithfully, diligently, and exclusively, as their servant, in the capacity of a collier, at their collieries in the townships of Brinsworth and Kimberworth, in the West Riding of the county of York, from the date hereof until the expiration of one of such notices as are hereinafter mentioned, or until the said workman shall be dismissed by the said Company or their agents for misconduct; and to obey the lawful commands of the said Company and of their agents, and also to conform to the rules, regulations, and by-laws of the said Company, copies of which have been delivered to the said workman on the signing hereof, as he doth hereby acknowledge, at all times during such service; and that the said workman will not absent himself from the employ of the said Company at any time during his service, without the consent of the said Company or their agents first had and obtained; and also that the said workman will not quit or leave the service of the said Company without giving to them, or their principal agent or cashier, twenty-eight days' notice in writing of his intention to do so, or until the month to be named in such notice shall have expired; and further, that he will carefully preserve all such working tools and implements as he may be intrusted with by the said Company or their agents, and also leave his colliery working in proper workmanlike order at the determination of this contract; and, lastly, that it shall be lawful for the said Company or their agents to stop and deduct from any wages which may be due to the said workman, such sum or sums of money as may, according to the provisions of the statute in that behalf, be due to the said Company from
*52] the *said workman for or in respect of the rent of any cottage he may occupy under the said Company, or for or in respect of any fuel, mining tools, candles, oil, or other materials or implements which may be supplied by the said Company or their agents to the said workman for the purpose of his occupation and employment as such collier as aforesaid. And the said Thomas Bolland, on behalf of himself and his said partners as aforesaid, in consideration of such faithful service by the said workman, and of the proper performance by him of the stipulations above mentioned, hereby agrees that the said workman shall not be discharged by the said Company without twenty-eight days' notice in writing being given for that purpose, unless the said workman shall misconduct himself in their service, in which case the said Company, or their principal agent, shall have the right to discharge him immediately, without notice.

"JOHN WHITTLE, X
"THOMAS BOLLAND."

It was also proved on behalf of the respondent that the appellant entered into the service under the said contract; and afterwards, and while it was subsisting, that is, on the day named in the information, had wilfully absented himself from the service without leave or lawful excuse. It was also proved that all wages then due to the appellant for all work done by him had been paid to him, and that he was paid

by piecework, and not by time. Evidence was also given on behalf of the appellant that there had been a dispute about wages.

It was contended on behalf of the appellant, first, that the agreement did not bind the master to find work or pay wages, and was therefore bad for want of mutuality; *secondly, that the information was bad for proceeding in the name of "Thomas Bolland [*53 and his partners," and not in the name of the Company; thirdly, that there were no wages due at the time the alleged offence was committed, and therefore no wages could be abated; fourthly, that there was a bona fide dispute as to the amount that should be paid for certain work required to be done under the contract, and, the contract not providing for any such dispute or difference, the justices had no jurisdiction under the statute, and the appellant was not guilty of misconduct and misdemeanour, and did not unlawfully absent himself from his service, and such dispute or difference constituted a lawful excuse, and was a reasonable cause for such absenting.

The justices however were of opinion, first, that, by reasonable implication, the agreement bound the master to find work and pay wages, and was a valid agreement; secondly, that under the 11 & 12 Vict. c. 43, s. 1, the objection to the information could not be allowed, and they were of opinion that the variance, if any, between the information and the evidence adduced in support of it, had not in any way deceived or misled the appellant; thirdly, they were also of opinion that the statute authorized them to convict the appellant, and commit him to prison, although there were no wages due or becoming due to him which they could abate; fourthly, they were also of opinion, from the evidence before them, that there was no dispute or difference as to the amount to be paid for work under the said contract which amounted to a lawful excuse or justification for the appellant refusing to work under the contract, or for absenting himself from the service before the term of his contract was completed, and that the appellant was *aware that he had no lawful excuse for [*54 absenting himself.

Whereupon the opinion of this Court was asked whether or not the justices were correct in their determination.

The conviction was founded on the 4 G. 4, c. 34, s. 3, which enacts, "If any servant in husbandry or any artificer, calico printer, hand-craftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, shall contract with any person or persons whatsoever, to serve him, her or them for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract (such contract being in writing and signed by the contracting parties), or having entered into such service shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same, then and in every such case it shall and may be lawful for any justice of the peace of the county or place where such servant in husbandry, &c., shall have so contracted, or be employed or be found, and such justice is hereby authorized and empowered, upon complaint thereof made upon oath to him by

the person or persons, or any of them, with whom such servant in husbandry, &c., shall have so contracted, or by his, her or their steward, manager or agent, which oath such justice is hereby empowered to administer, to issue his warrant for the apprehending every such servant in husbandry, &c., and to examine into the nature of the complaint; and if it *shall appear to such justice that any such servant in husbandry, &c., shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanor as aforesaid, it shall and may be lawful for such justice to commit every such person to the house of correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months, and to abate a proportionable part of his or her wages, for and during such period as he or she shall be so confined in the house of correction, or in lieu thereof, to punish the offender by abating the whole or any part of his or her wages, or to discharge such servant in husbandry, &c., from his or her contract, service, or employment, which discharge shall be given under the hand and seal of such justice *gratis*."

Quain, for the respondent.—The first and main question is whether this contract is bad for want of mutuality, on the ground that it fixes no rate of wages, and does not bind the employer to supply the workman with work. But the agreement is a mutual one, binding on both sides; for it expressly stipulates that the workman is to serve the master, and it further stipulates that the master shall not discharge him without giving twenty-eight days' notice. [CROMPTON, J.—I never could understand that mutuality doctrine. Take the case of a contract of guarantee; the only question there is, was there any consideration to support the contract? If so, it is synallagmatic.] In *Regina v. Welch*, 2 E. & B. 357, 362 (E. C. L. R. vol. 75), which strongly resembles the present case, Lord Campbell says, "The necessity of giving notice clearly shows that there is some obligation on the employer. What was *that? To find reasonable employment according to the state of the trade. That is not an unilateral agreement, but a mutual agreement, with something to be done on each side. This view does not conflict with the authorities. On the contrary, it agrees with *Pilkington v. Scott*, 15 M. & W. 657, a case directly in point." As to no rate of wages being fixed in the agreement, the law clearly is, that in such cases a reasonable rate of wages is to be intended. *Valpy v. Gibson*, 4 C. B. 837 (E. C. L. R. vol. 56), shows that a contract of sale may be complete and binding, though silent as to the price, for such silence is equivalent to a stipulation for a reasonable price. [CROMPTON, J.—In the time of Tindal, C. J., the Court of Common Pleas considered that point in a case arising under the Statute of Frauds.(a)]

Secondly, as to the objection of variance. It is doubtful if the matter here insisted on as a variance is one in reality. But, supposing it is, the difficulty is got over by stat. 11 & 12 Vict. c. 43, relative to informations before justices of the peace, the 1st section of which contains this proviso, "Provided also that no objection shall be taken or allowed to any information, complaint, or summons, for any alleged defect therein in substance or in form, or for any variance between such information, complaint, or summons, and the evidence adduced

(a) The learned Judge probably means *Hoadly v. M'Laine*, 10 Bing. 482 (E. C. L. R. vol. 25).

on the part of the informant or complainant at the hearing of such information or complaint as hereinafter mentioned; but if any such variance shall appear to the justice or justices present and acting at such hearing to be such that the party so summoned and appearing has been thereby deceived or misled, it shall be lawful for such justice or *justices, upon such terms as he or they shall think fit, to adjourn the hearing of the cause to some future day." Here [*57.] the justices find that the party was not misled. [CROMPTON, J.—That is a healing act.]

Mellish, for the appellant.—The first point in this case is of great importance, seeing that contracts in the present form are very prevalent. Such contracts are in restraint of trade; and are most unjust towards the ignorant men called upon to sign them, who are liable to be proceeded against penalily for any infraction on their part, while no obligation is imposed on the employer. In the first place, this contract neither specifies the kind of work nor the rate of wages. The contract may mean that the workman is to be provided with piece-work; and if so, what would be the case supposing, by a rise of water, the colliery were stopped for a month. [CROMPTON, J.—The usage of the trade would probably determine how the workmen should be employed during that time.] No custom of trade has been found in this case. In *Sykes v. Dixon*, 9 A. & E. 693 (E. C. L. R. vol. 36), where a man contracted in writing to work for another in his trade, and for no other person during twelve months, and so on from twelve months to twelve months, until he should give notice of his intention to quit the service, it was held invalid under the Statute of Frauds for want of mutuality. [CROMPTON, J.—That is a good deal shaken by *Pilkington v. Scott*, 15 M. & W. 657.] In that case the parties had provided both for the cessation of the work and the mode of calculating the amount of wages, and the judgment proceeded rather on the question of the contract not being in unlawful restraint of trade. *In *Lees v. Whitcomb*, 5 Bing. 34 (E. C. L. R. vol. 15), [*58] A. B. entered into a written agreement "to remain with C. D. for two years for the purpose of learning the business of," &c., and this was held bad for want of mutuality. [CROMPTON, J.—In the two cases you have cited the agreement was not signed by both parties.] [He also cited *Ex parte Baker*, 2 H. & N. 219; 7 E. & B. 697 (E. C. L. R. vol. 90).] Again, there is nothing in this contract binding the master to employ the workman at all. *Williamson v. Taylor*, 5 Q. B. 175 (E. C. L. R. vol. 48), is an authority for the appellant on this point; and *Aspdin v. Austin*, 5 Q. B. 671, bears, though less directly, on the question. [CROMPTON, J.—*Emmens v. Elderton*, 4 H. L. Ca. 624, goes far to show that where the relation of master and servant exists between the parties, the master is bound to keep the servant in the service, otherwise the whole thing would be illusory.] In *Williamson v. Taylor*, 5 Q. B. 175 (E. C. L. R. vol. 48), there was no agreement not to discharge within a specified time.

Secondly, as the question of variance. The conviction is not set out in the case, which creates considerable difficulty.

COCKBURN, C. J.—The objection on the ground of variance is got over by the 11 & 12 Vict. c. 43, s. 1.

Then, as to the main objection that this contract is bad for want of

mutuality, the employer not being bound to find the appellant in work, I think that the decision of the justices was right. The agreement between the parties is that the appellant shall serve the employer, who, on the other part, undertakes that he will pay him wages fortnightly, and will not *discharge him without twenty-eight [59] days' notice. From these two stipulations I think it arises by implication that the employer will find the appellant work, and will not discharge him from the service before a certain time. It would be perfectly illusory to hold otherwise; and, if this be so, there can be no objection to the contract on the ground of want of mutuality.

CROMPTON, J. (the only other Judge present), concurred.

Judgment for the respondent.

*60]

*REGULA GENERALIS.

HILARY TERM, 25 VICT.

IT is ordered that, from and after the first day of Easter Term next inclusive, every special case, special verdict and bill of exceptions, set down in any of the superior Courts of common law, shall be divided into paragraphs, which as nearly as may be, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively.

And that the Masters on taxation do not allow the costs of drawing and copying any special case, special verdict or bill of exceptions, not in substance in compliance with this Rule, without the special order of the Court.

A. E. COCKBURN.
W. ERLE.
FRED. POLLOCK.
WM. WIGHTMAN.

CHARLES CROMPTON.
E. V. WILLIAMS.
J. WILLES.
COLIN BLACKBURN.

END OF HILARY TERM.

***HILARY VACATION, 25 VICT. 1862.**

[*61]

ARCHER v. JAMES and Others. [Nov. 4, 1859.]

1 & 2 W. 4, c. 37, s. 1.—Wages.—Deductions.—Set-off.—Appeal.—Costs.—Truck Act.

1. The defendants, master manufacturers, employed the plaintiff, an artificer, without any agreement in writing, to make stocking heels at 7d. a dozen. The plaintiff was to find the labour, and to work on the defendants' premises, using their frame. The settlements were weekly. The amount due for the plaintiff's work was first ascertained; then from the sum coming to him were deducted the following charges: (1.) Frame rent, for the use of the frame with which he worked, at 1s. 9d. per week. (2.) Machine rent, at 4d. per week. (3.) For standing room in the defendants' factory, at 3d. per week. (4.) Winding the yarn, at 1d. per week. (5.) Fines for irregular attendance, at 4½d. a quarter of a day for time of absence. (6.) Gas for lighting the defendants' factory, at 4d. per week. (7.) Fire for heating the defendants' factory. The amount of work performed by the plaintiff during the time he was in the defendants' employ varied from time to time, according to the state of trade, the plaintiff being sometimes employed for a greater and sometimes for a smaller number of hours in the day; but the charges, with the exception of the fines, were fixed and uniform, and were made whatever the amount of earnings. In an action to recover wages alleged to be due, the defendants pleaded Never indebted, and a set-off, consisting of the above charges. Held, per Pollock, C. B., Bramwell, B., and Byles, J. (affirming the judgment of the Court of Queen's Bench, which was founded upon the authority of Chawner v. Cummings, 8 Q. B. 311), Williams, Willes, and Keating, JJ., dissentientibus, that a contract to pay the plaintiff's wages, subject to the above deductions, was not a contract to pay part of such wages otherwise than in the current coin of the realm, within sect. 1 of the Truck Act, 1 & 2 W. 4, c. 37, and was therefore legal.

2. When the decision of the Court below is affirmed on appeal, the Judges of the Exchequer Chamber being equally divided, the successful party is not entitled to costs.

DECLARATION for money payable by the defendants to the plaintiff for wages due and of right payable from the defendants to the plaintiff for his work and labour as an artificer, workman, and labourer in and about the making, knitting, and preparing of woollen, worsted, yarn, and cotton manufactures, by *him done and performed as a hired artificer, workman, labourer, and servant of the defendants; and for work and labour of the plaintiff in and about the manufacturing trades and occupations of making, knitting, and preparing of woollen, worsted, yarn, and cotton manufactures, by him done and performed for the defendants, at their request; and on an account stated.

The defendants pleaded never indebted, and payment: and also a set-off for money payable by the plaintiff to the defendants, for the plaintiff's use, by the defendants' permission, of certain frames and machines, goods and chattels, of the defendants, and standing room for the same; and for the hire of chattels and effects by the defendants let to hire to the plaintiff; and for work done by the defendants for the plaintiff, at his request; and for money paid by the defendants for the plaintiff, at his request; and for money found to be due from the plaintiff to the defendants on accounts stated between them.

Upon these pleas issue was joined.

The following is a copy of the particulars of the defendants' set-off.

	£	s.	d.
1. Frame rent, at 1s. 9d. per week	14	10	5
2. Machine rent, at 4d.	2	13	4
3. Standing, at 3d.	2	0	0
4. Winding, at 1s.	8	0	0
5. Fines	1	5	1
6. Gas, at 4d.	1	9	11
7. Fire in waiting room	0	11	3
	<hr/>		
	£30	10	0
	<hr/>		

*63] On the trial, before Williams, J., at the Summer *Assizes at Nottingham, in 1859, it appeared that the plaintiff had, from the 20th September, 1855, until the 25th April, 1857, and again from the 6th June, in the latter year, until the 4th June, 1859, been a framework knitter, employed in a branch of the hosiery manufacture by the defendants, who carry on their business as manufacturers of hosiery in their own premises, namely a factory, at Nottingham. The plaintiff and other artificers worked for the defendants, in the frames and machines belonging to the defendants, in the factory. The plaintiff's work consisted in making heels of stockings with material of the defendants, the plaintiff merely finding labour; and he was paid for his work weekly, upon the basis of 7d. per dozen heels made by him during the week, subject to certain fixed charges made by the defendants, which are mentioned in the particulars of the set-off, and are hereafter more particularly set out and explained. At the weekly settlements the amount of the plaintiff's work was first ascertained, then the amount of charges was deducted, and the balance paid to the plaintiff in cash, to which he had never made any objection. The following are the particulars of the charges so deducted, and mentioned in the defendants' set-off.

1. A frame rent, or sum of 1s. 9d. per week, for the use of the frames furnished by the defendants (in their own factory), and there employed by the plaintiff in performing his work.

2. A machine rent, or sum of 4d. per week, for the use of a machine furnished by the defendants in their own factory, by which stockings are narrowed much quicker than formerly, and there also employed by the plaintiff in performing his work.

*64] *3. Threepence per week as a remuneration to the defendants for the use by the plaintiff of their factory wherein to perform the work for them, and for the standing room of the frames and machinery therein which the plaintiff worked.

4. A sum of 1s. per week for winding the yarn, which would be a necessary operation for each workman before the yarn could be used for the purpose of manufacture, but which winding had been performed before the yarn came upon the defendants' premises.

5. Fines imposed for irregular attendance at the factory, at the rate of 4½d. a quarter of a day for the time of absence.

6. For gas supplied by the defendants for the purpose of lighting their said factory, instead of the men lighting it themselves.

7. For firing supplied by the defendants for the purpose of heating their said factory, instead of the men heating it themselves.

The amount of work performed by the plaintiff during the time he

was in the defendants' employ varied from time to time, according to the state of trade, the plaintiff being sometimes employed for a greater and sometimes for a smaller number of hours in the day; but the charges, with the exception of the fines, were fixed and uniform, and were made whatever the amount of his earnings.

The plaintiff was, by the weekly settlements, during the time he was so in the defendants' employment, paid the whole amount due to him as such artificer as aforesaid, less the charges and deductions aforesaid, and for which alone, accruing during the whole service, the present action is brought.

*Previously to the case of *Chawner v. Cummings*, 8 Q. B. 311 [*65] (E. C. L. R. vol. 55), it had been the established and unvarying usage in the hosiery manufactures in the counties of Nottingham, Derby, and Leicester, for a century past, for the employer to let the frames, at a rent, to the person with whom he contracted for the manufacture of his materials into goods and upon settling with the workman to deduct the amount of frame rent from the gross price agreed for working up the materials into goods. The frames were kept in repair by the owners of them, at frequent expense, and the number of them for which weekly rent had been for many years charged was very great. It was admitted that the other deductions made by the defendants in this case were made according to the then usage of the trade, except as mentioned in the next paragraph, and that such usage was known to the plaintiff, and that he was during the whole period aforesaid dealt with accordingly. This work, however, has recently been introduced into factories, and, in consequence, the system of payment in such factories is not as yet uniform, some employers deducting charges, while others make a corresponding diminution in the rate of payments, so as to make the nominal sum net instead of gross. For example, in such a case 5d. per dozen is paid for heeling, instead of 7d., as paid by the defendants.

The sum for which this action was brought is the total amount of the said charges or deductions which accrued during the period of the plaintiff's employment by the defendants. The plaintiff relying on stat. 1 & 2 W. 4, c. 37, commonly called the Truck Act, disputed the legality of these charges and deductions, and *contended that [*66] he was entitled to recover the full amount of his wages or earnings at the rate of 7d. per dozen. The defendants contended that the sum of 7d. per dozen was not the wages payable to the plaintiff until the usual charges had been paid out of the same.

There was no written contract between the parties.

The jury found that all the deductions were according to the usage of the trade; and it was agreed that, but for stat. 1 & 2 W. 4, c. 37, the accounts had all been agreed and settled between the parties. The learned Judge thereupon directed a nonsuit to be entered, reserving leave to move to enter a verdict for the plaintiff for the amount of all or any of the items in the defendants' set-off.

In Michaelmas Term, 1859,

Hayes, Serjt., moved for a rule nisi accordingly, on the ground that the deductions, which were the subject of the set-off, were to be considered as payment of wages, and were, therefore, illegal by the

Truck Act, 1 & 2 W. 4, c. 37, the object of which was that wages should be paid in the current coin of the realm.

COCKBURN, C. J.—The principle of the decision in *Chawner v. Cummings*, 8 Q. B. 311 (E. C. L. R. vol. 55), applies to this case. The deductions in question are expenses incurred by the master, in providing accommodation for the workman, which the master takes into account before the real amount of the wages is ascertained; therefore they are not within stat. 1 & 2 W. 4, c. 37. If the plaintiff is desirous of having the decision in *Chawner v. Cummings*, 8 Q. B. 311 (E. C. L. R. vol. 55), reviewed, he does not require our assistance.

*⁶⁷ WIGHTMAN, J.—These deductions are within the principle of the decision in *Chawner v. Cummings*. Whatever doubts I might have entertained if the question had now come before us for the first time, I think we are bound by that decision.

HILL, J., concurred.

Rule refused.

IN THE EXCHEQUER CHAMBER.

ARCHER v. JAMES and Others. Feb. 1; May 14.

For head-note, see ante, p. 61.

THE plaintiff having appealed from the above decision, the case was argued, in Easter Vacation, May 9th, 1861, and Trinity Vacation, June 14th, 1861, before Pollock, C. B., and Bramwell, B., and Williams, Willes, Byles, and Keating, JJ.

Hayes, Serjt. (with him *Manley Smith*), for the plaintiff.—It has been the object of the Legislature, in a series of statutes beginning with 4 Edw. 4, c. 1, and ending with 1 & 2 W. 4, c. 37, commonly called the Truck Act, to enforce the payment of wages to artificers in the current coin of the realm. The earliest enactment on the subject is in sect. 5 vers. fin. of stat. 4 Edw. 4, c. 1, by which, reciting that "in the occupations of clothmaking, the labourers thereof have been driven to take a great part of their wages in pins, girdles, and other *⁶⁸ unprofitable wares, under such price that it did not extend to the extent of their lawful wages," it was enacted, "That every man and woman being clothmakers, shall pay to the carders, spinsters, and all such other labourers, in any part of the said trade, lawful money for all their lawful wages, and payment of the same upon pain of forfeiture to the same labourer the treble of his said wages so not paid, as often as the clothmaker doth refuse to pay the same in the said manner and form to any such labourer, put by him to the occupation in any of the said parts of clothmaking."

The word "truck," which means "exchange of commodities," or "barter," (see Webster's Dictionary), is first used in stat. 12 G. 1, c. 34, s. 3, by which every clothier, &c., or person concerned, &c., in employing weavers or other labourers in the woollen manufacture, shall pay unto all persons by them so employed the full wages or price agreed on "in good and lawful money of this kingdom," and shall

not pay "in goods or by way of truck, or in any other manner than in money as aforesaid."

All previous statutes upon the subject are repealed by stat. 1 & 2 W. 4, c. 36, s. 1, and their provisions are consolidated in the statute immediately following, 1 & 2 W. 4, c. 37. This case is alike within the language and policy of that statute, which was passed for the protection of workmen. *Bowers v. Lovekin*, 6 E. & B. 584 (E. C. L. R. vol. 88). [He cited sects. 1, 2, 3 and 4.] The wages of the plaintiff were to be paid in part by the rent of the frame and the other charges which are the subject of the set-off, and, therefore, "otherwise than in the current coin of the realm;" and this mode of payment is within the mischief against which the statute was directed, because the [*69] rent of the frame is the same in whatever condition it is, and the workman cannot go and have a frame elsewhere. Also the deductions made in respect of this and the other charges, with the exception of the fines, are fixed and uniform whatever number of stocking heels is made in a week, and that depends upon the supply of material by the master. Upon the basis of such a contract as this, the amount of the wages to be paid to the plaintiff might be nothing; because the deductions might equal or exceed the amount due for stocking heels. It cannot be said that the wages are the amount calculated at 7d. per dozen heels less the deductions, because there is no relation between that amount and the deductions, the one being calculated by the piece, and the other by time. Where the manufacturer supplies the machines and room, and pays the workman a lower sum for net wages, sometimes, as is found in the case, 5d. a dozen for heel-ing, the master and workman gain by the rise, and suffer by the depression of the trade together; but under the arrangement between the defendants and the plaintiff at a certain state of the trade the defendants, by distributing their work among a number of workmen, and giving each only as much as would make 8s. 9d. worth of heels a week, would get them made for nothing, and the parish might have to support the men. Sect. 23 excepts the supply of fuel and tools or implements when the artificer is employed in mining, as well as of certain other things under certain circumstances: which shows that, but for the express saving in that section, those things could not be supplied in part payment of wages. In *Chawner v. Cummings*, 8 Q. B. 311 (E. C. L. R. vol. 55), the defendant for whom the plaintiff worked was a middleman, who rented frames *and other ma-[*70]chinery from a master manufacturer. In this case, there is a con-tract by which the master gets the profit which the middleman got in *Chawner v. Cummings*, 8 Q. B. 311 (E. C. L. R. vol. 55). Also that case did not decide that a deduction for fire or light, which are two of the charges here, would be legal.

The interpretation clause, sect. 25, shows that the term "wages" is to receive a large construction, and means any recompense for labour. At any rate, a deduction for an uncertain sum like fines cannot be legal: they are a punishment for absence from work. Also the charge for winding the yarn cannot be deducted, because it is a cross claim for work done by the master for the workman.

Macaulay (with him *C. G. Merewether*), for the defendants.—The object of stat. 1 & 2 W. 4, c. 37, as shown by its language, is, that

whatever was the valued amount of the labour of the workman, between him and his master, should be paid in the current coin of the realm. The money or thing given for the labour is wages; and the question is, whether the plaintiff earned more than what has been paid in money, or whether any part of the wages agreed between him and the defendants has not been paid in money. Formerly there were two modes of carrying on the manufacture of stocking heels; either the manufacturer, who was a large proprietor of frames, let them out to a middleman, who employed artificers in working at the frames on his premises, as in *Chawner v. Cummings*, 8 Q. B. 311 (E. C. L. R. vol. 55); or the manufacturer let out the frames to a man who worked at them at his own home with his family or others; the manufacturer in each case providing the worsted or other material, to be brought back in stocking heels to be paid for at so much a dozen. If the artificer worked at a frame at his own house, which might be out of the town, he lost time in taking the stocking heels to the town, and had the expense of keeping the frame in order. The practice has recently been introduced of doing the work in factories belonging to the manufacturers, as stated in the case; the manufacturers providing the frames, the room, the fire and gas, the winding and the worsted or other material. In this case the wages of the plaintiff were not 7d. per dozen heels, but 7d. per dozen less the amount of charges deducted. The charges deducted are no part of the recompense for the plaintiff's labour, but only the mode of ascertaining the value of his labour. [WILLES, J.—Why do not the defendants agree to pay 5d. per dozen or some other fixed sum, and say nothing about deductions? The same question was put by Wightman, J., in *Chawner v. Cummings*, 8 Q. B. 311, 319.] It would be difficult to make an adjustment by an average on the items deducted; also the trade price of stockings fluctuates, but the price for the use of the frame is fixed.

Hayes, Serjt., replied.

Cur. adv. ruli.

Feb. 1. There being a difference of opinion on the Bench, the following judgments were delivered.

KEATING, J.—In this case the plaintiff, an artificer, in the hosiery trade at Nottingham, sued the defendants, his employers, to recover an amount of wages alleged to be due; and, in answer to the claim, the defendants *pleaded never indebted, payment, and a set-off consisting of certain charges against the plaintiff for the rent of frames and machines, and other charges of a similar character, which had been deducted by the defendants on the weekly settlement of accounts, and which, if such deductions were legal, would furnish an answer to the plaintiff's claim.

The plaintiff worked, without any agreement in writing, at the manufactory of the defendants, in making heels of stockings at 7d. a dozen, subject to a deduction of certain fixed charges, which was made every week from the amount of his work, taken at 7d. per dozen, and the balance only was paid to him in cash. These charges were—

1. Frame rent for the use of the frames with which he worked, at 1s. 9d. per week.

2. Machine rent, at 4*d.* per week.
3. For the standing of the frames and machinery in the defendants' manufactory, 3*d.* per week.
4. Winding the material with which he worked, at 1*s.* per week.
5. Fines for irregular attendance, at 4*½d.* a quarter of a day for time of absence.
6. Gas for the lighting the defendants' factory, at 4*d.* per week.
7. Fire in waiting-room.

Amounting to about 3*s. 9d.* fixed charges, the fines varying according to circumstances. Whilst, however, the charges, to the amount of 3*s. 9d.* per week, were fixed, the amount of work performed varied according to the number of hours during which his masters required his services.

It was contended by the plaintiff that these deductions were illegal, as being within the prohibitions contained *in stat. 1 & 2 W. 4, [*73 c. 37, commonly called The Truck Act; and I am of opinion he is right.

In passing the statute referred to, the Legislature seems to have considered the artificer as requiring special protection in his dealings with his employers, and to have thought it right, therefore, to make the contracts between these parties one of the exceptions to the general rule, that persons should be allowed to make their own contracts in their own way. The particular evil intended to be remedied (and which, notwithstanding former enactments, still prevailed) was the truck system, or payment by masters of their men's wages wholly or in part with goods—a system manifestly to the disadvantage of the workman, who was, practically, forced to take the goods at his master's valuation. In order to obviate this, the statute, reciting "that it is necessary to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm," by sect. 1, enacts, that any contract by which the whole or any part of the wages of the artificer is made payable in any other manner than in the current coin shall be null and void. Sect. 2 prohibits the insertion in any contract of any provision as to the manner in which, or the person with whom, any part of the wages due or to become due shall be laid out or expended. Sect. 3 directs that the entire amount of the wages earned by or payable to the artificer shall be actually paid to him in the current coin of the realm, and not otherwise, and that every payment of or in respect of wages by the delivery to him of goods, or otherwise than in the current coin, except as thereafter mentioned, shall be illegal and void. Sect. 4 enables the artificer to recover so much of the wages as shall not have been actually paid to him *in current coin. Sects. 5 and 6 prevent the master recovering or setting off the amount of any goods, &c., supplied on account of wages, or sold at any shop of the master, or in which he has any interest, although the wages may have been paid in current coin. The exceptions referred to in sect. 3 are found in sect. 23, which allows a supply of tools, &c., to persons employed in mining, and a supply of other things, therein enumerated, under certain circumstances; also providing that a stoppage or deduction in respect of such may be made if it do not exceed the true value of the supply.

and the contract for such stoppage or deduction be in writing, signed by the artificer.

The statute, therefore, seems most distinctly to provide that the whole of the wages of the artificer's labour shall be paid to him in current coin, and not otherwise, without any stoppage or deduction, except in the cases and under the conditions referred to in sects. 23 and 24, and except he freely consents, under sect. 8, to the substitution of bank notes for such current coin. These enactments are made still more stringent by the additional penal clauses; and what shall be deemed and taken to be "wages" of labour is declared, by sect. 25, to be "any money or other thing had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any labour done or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain."

The question, therefore, in the present case, seems shortly to be this—was any "other thing" than money "had" by the workman, and "given" by the master, "as a recompense, reward, or remuneration for any labour done" by the former for the latter? In other words, were the benefits represented by 3s. 9d.—viz. the use of the frame and machine, fire, light, &c.—given by the defendants to the plaintiff in exchange for and as part of the earnings of his labour or not? That they were, in fact, "given" by the master to the workman, and "had" by the workman from the master, is as unquestionable as that they are not current coin, and were not given for nothing. For what, then, were they given except for the labour of the workman? Clearly, as it seems to me, for nothing else; the workman had nothing else to give for them but his labour, and gave nothing else. I am, therefore, unable to perceive how it can be successfully contended that the plaintiff was not paid his wages, as above defined, "otherwise than in money."

That he was not paid 7d. a dozen in money for the stocking heels was admitted; but it was said that 7d. a dozen did not represent his wages, but that his wages were 7d. a dozen minus a proportionate part of the 3s. 9d., and that he was therefore paid his wages in money. But this appears to me to be another way of saying either that the benefits represented by the 3s. 9d. were not given to him at all, or that, if given to him, it was not in exchange for his labour. If goods had been supplied by the master to the workman to the amount of 3s. 9d., instead of the use of goods to the same amount, and deducted from the 7d. per dozen, the artificer would not have been more or less paid "otherwise than in current coin" in the one case than the other; or if the workman had contracted with a third person to supply him with the things supplied by the master, the stocking heels would have clearly represented the value of 7d. a dozen, and he would have been paid that amount in money; how, then, can the stocking heels represent *less labour or more, according as the workman hires the implements for making them from one person or from another? It is quite true that if 3s. 9d. be a fair price for the hire of the frame and machine, fire, light, &c., the result to the workman would be the same whether he hired them from his master or from a stranger, just as if he had been supplied at a fair price by his master with goods, which, if not purchased from him, he must have bought from a

stranger. Yet that is precisely what the statute forbids. Suppose the workman to make for his master only six dozen and a half of stocking heels, that being about the amount which would repay the 3s. 9d. at 7d. a dozen, what does the master pay for them? Does he pay 7d. a dozen, 3s. 9d., or does he get them for nothing? There seems to me to be no medium. But the workman makes another six dozen and a half; for them he gets precisely 3s. 9d. Will the last 3s. 9d. be wages and the first not, or is there any other difference, except that the last is paid for in current coin, and the first "otherwise than in current coin?" It seems to me there is none.

The defendants, therefore, have paid the plaintiff, in exchange for his labour, otherwise than in money; and such is declared by the Act to be illegal. Whether rightly or wrongly it is not our province to inquire: it is sufficient if it be declared clearly and distinctly. The legislature has thought the payment of wages by masters to their workmen of a particular class, wholly or in part, in goods or otherwise than in money, to be liable to abuse, and therefore undesirable; and the present case furnishes a flagrant example of the precise evil intended to be remedied by the statute, viz. the giving by masters to their workmen, in exchange for their labour, wholly *or in part, [*77 things of *uncertain value*, instead of money, the value of which is *certain*. Here, by the contract, whilst the workman is forced to take that which is of uncertain value, in exchange for his labour, and to take it from the master alone, the latter reserves to himself the power of determining how much wages, if any, the workman shall earn beyond the precise sum necessary to reimburse himself for the outlay of his capital in building, lighting and heating his own manufactory, and providing the necessary implements for use therein. A more complete instance of that from which it appears to have been the intention of the Legislature to shield the artificer, it seems to me difficult to imagine.

But it is said that the case of Chawner *v.* Cummings, 8 Q. B. 311 (E. C. L. R. vol. 55), has already sanctioned this species of contract, and decided it not to be a violation of the statute; and undoubtedly (without, for the present, referring to the additional number of items of deduction we find in the present case, probably resulting from that decision) it does appear to be an authority to the extent stated. But I apprehend that, sitting in a Court of error, we are bound to look at the case before us unfettered by the authority which it is the object of the present proceeding to review; and, humbly conceiving that decision not to construe the statute correctly, I have been unable to convince myself that, sitting here, I ought to adhere to it. The judgment of the court in that case seems to have proceeded upon the ground that the earlier sections of the statute do not prohibit any deductions whatever. "It is to be observed" (says the judgment, p. 323) "that *payment* otherwise than in money is alone prohibited. Deductions or charges are nowhere mentioned or alluded *to before [*78 the 23d section, hereafter to be considered. Then, are these deductions in the nature of payment at all? It seems to us to be the mode of calculating the amount of wages, and nothing more."

Now, if it be true that the prohibitory part of the statute does not contemplate stoppages or deductions, it is extremely difficult to see

why the Legislature should have enacted the 23d and 24th sections at all—why, if it did not prohibit any stoppages, it should yet legalize some. But surely it is scarcely correct to say that the earlier sections do not mention or allude to stoppages or deductions, when the 3d section expressly refers to, and in effect incorporates, the exceptions afterwards found in the 23d and 24th, the words of sect. 3 being, "and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, *except as hereinafter mentioned*, shall be and is hereby declared illegal, null, and void." And it would have been strange, indeed, if it were otherwise, for the truck system, against which the statute was confessedly levelled, was itself a system of stoppage or deduction. Deduct so much for supplies and pay the balance in cash, constituted the evil the statute was passed to remedy; nor is it easy to perceive how there could be a part payment in goods, or otherwise than in the current coin, without a stoppage or deduction.

That the deductions legalized by sects. 23 and 24 are exceptions upon sects. 2, 3 and 4, and not exclusively upon sects. 5 and 6, appears to me to be clear, inasmuch as the prohibitions contained in the latter sections are confined to the set-off and sale of "goods, wares, and *79] merchandise" only; whereas the deductions legalized by *sects. 23 and 24 extend to medical attendance, rent, and the costs of educating the artificer's children.

I quite agree that what is called "frame rent" in this case is not "rent" within the meaning of sect. 23; but that a deduction in respect of such, if it were "rent," could be made without a contract in writing, which was also laid down in the judgment in Chawner *v.* Cummings, 8 Q. B. 311, 325 (E. C. L. R. vol. 55), appears to me not to be in accordance with the clear words of the statute.

The only case cited in the argument before us, as having been decided upon this subject since Chawner *v.* Cummings, was that of Bowers *v.* Lovekin, 6 E. & B. 584 (E. C. L. R. vol. 88). There it was conceded that the deductions were illegal, although some of them were not clearly within the 23d section; but that case being one of deductions from the wages of a miner, where there was no contract in writing, the question involved in the present case was not discussed, the only contest being whether the collier in that case was an artificer within the Act. But although not, perhaps, an authority upon the point now in question, the case strongly illustrates the anomaly consequent upon the judgment in Chawner *v.* Cummings, 8 Q. B. 311, 325 (E. C. L. R. vol. 55), namely, that whilst stoppages within the 23d section are illegal if not made in pursuance of a written contract signed by the workman, all other stoppages are legal without any such formality. The price of implements supplied to a miner to be used in his trade can only be deducted when that price represents their true value, and the contract is in writing; but it would appear from that judgment that the price of the use of implements supplied to a stocking knitter to be used in his trade, as well as gas-light, fire, *80] *etc., may be deducted without either of those conditions being complied with.

It is true, the learned counsel for the defendants did not put the case of his clients altogether upon the ground taken in the judgment

in *Chawner v. Cummiugs*, 8 Q. B. 311 (E. C. L. R. vol. 55). He relied not so much upon the argument, that if these charges were stoppages or deductions they were legal, not being in the nature of payments, as that they were not really deductions from wages at all; in other words, that the defence to the action was under the general issue, rather than under the plea of set-off. But surely it cannot be contended, in any view, that the stoppage in respect of *fines* can be made available otherwise than as a set-off; and if that be so, by what reasonable construction of the contract can the deduction for fines be placed upon a different footing from the other deductions?

It appears to me that the contract is clearly one for stoppage or deduction from wages—a “contrivance” (to use the words of the 25th section of the Act) by means of which the master makes the interest of his capital a first charge upon the labour of his workman, instead of obtaining it from the consumer in the price of the article when sold, as in the case of a net cash payment of wages; and this, together with the additional control which the master obtains, by such an arrangement, over the earnings of the workman, may probably furnish the answer to a question put during the argument, namely, if 2d. per dozen fairly represents the value of the deductions (and the case does not find otherwise), why do not the defendants pay 5d. per dozen net like other masters?

Our attention has been called to the consequences that may result from our decision in favour of the plaintiff in *this case. If such were to follow upon our judgment, it would be a matter [*81] rather for the consideration of the Legislature than for a Court of law; and it seems to me safer to construe the statute without reference to the inconvenience resulting from our upholding or refusing to sanction a contract like the present.

In my opinion the plaintiff is, in point of law, entitled to the judgment of the Court.

I have to state that my Brothers Williams and Willes concur in this judgment.

BYLES, J.—In this case the master manufacturer employed the artificer to make stocking heels at 7d. a dozen. The artificer was to find the labour, and to work on the master's own premises, using the master's frame.—The settlements were weekly. The amount due for the artificer's work was first ascertained; then from the sum coming to the artificer was deducted—

- (1.) 1s. 9d. per week for the use of the frame.
- (2.) 4d. per week for the use of another machine.
- (3.) 3d. per week for the use of the factory.
- (4.) 1s. per week for winding the yarn.
- (5.) Fines at the rate of 4½d. per quarter of a day for absence.
- (6.) A charge for gas.
- (7.) A deduction for firing.

The artificer was sometimes employed, and sometimes not; but the charges, with the exception of the fines, were fixed and uniform, and made against him whatever the amount of his earnings: so that the fixed charges might equal or exceed the amount to be received by the artificer for making stocking heels. When he came for his wages he might have to pay, instead of to receive.

*82] *It was alleged by the artificer that such a contract, and all settlements of account under it, are void and illegal by the provisions of the Truck Act, 1 & 2 W. 4, c. 37. Whether they are so invalidated or not is the question before us.

An inquiry into the policy of the Act, for the purpose of forming or expressing an opinion whether that policy be right or wrong, is no part of our duty; but such an inquiry for the purpose of rightly interpreting the Act and giving full effect to the true intention of the Legislature, is legitimate and material.

The old truck enactments are very numerous, and date from about the year 1464 (4 Edw. 4). They were applied first to one branch of manufacture, and then in succession to others, as experience and the progress of manufactures dictated, till they embraced the whole, or nearly the whole, of the manufactures of England. They established the obligation and produced, or at least fortified the custom, of uniformly paying the whole wages of artificers in the current coin of the realm. They were finally collected and consolidated into one Act by the statute now under consideration, 1 & 2 W. 4, c. 37. They were, in truth, part of a system of legislation regulating the relation of master and workman, this part of it being in favour of the workman, who, as an individual, was deemed weaker than his master, and therefore liable to oppression. On the other hand existed regulations in favour of the master, and against the workmen collectively, who in the aggregate and acting in combination were deemed stronger than their masters, and likely to oppress, not only their employers, but individuals of their own body. These were the laws against combinations and strikes. The laws against combinations have been swept away, *83] except in certain aggravated *cases, with what success it is no part of our business to inquire; but the Truck Act still remains, and while it remains must be honestly interpreted, and carried out according to its true meaning and spirit.

Indeed, the Truck Act, when passed, was a practical deduction from a principle, still more general, pervading more or less all systems of law founded on experience; that is to say, that where two classes of persons are dealing together, and one class is, generally speaking, weaker than the other, and liable to oppression, either from natural or accidental causes, the law should, as far as possible, redress the inequality, by protecting the weak against the strong. On this principle rests the protection thrown around infants and persons of unsound or weak mind, the protection afforded even by the common law to the victims of fraud, and by the Court of Chancery at this day to heirs, expectants, and sellers of reversions against catching and unconscionable bargains, though entered into without fraud, and by persons of full age. No doubt all such legislation or judicial interposition is in many cases ineffectual. But, as Lord Hardwicke observed in *Earl of Chesterfield v. Janssen*, 2 Ves. Sen, 125, 158, "I cannot hold that to be vain and wild which the law of all countries and all wise legislatures have endeavoured at, as far as possible; . . . happy, if they could, in some degree, prevent it: est aliquid prodire tenus;" to which it may be added that the efficacy of such provisions must not be estimated by the abuses actually remedied so much as by the abuses prevented by the knowledge that such is the law. So viewed, the Truck

Act must have been deemed by the Legislature which passed it a highly remedial statute, and is, therefore, now, as I admit, *not. [*84] notwithstanding the penal clauses, to be construed liberally, so as to advance the supposed remedy and suppress the supposed mischief.

The motive for these observations has been, that it may not be supposed that the conclusion at which I have arrived was reached without due consideration of the policy of the Truck Act, or prompted by any prejudice against it.

Our decision must, as it appears to me, mainly depend on the meaning of the word "wages" as used in the Act. The interpretation clause (sect. 25) defines the word "wages" as "any money or other thing had or contracted to be paid, delivered, or given as a recompence, reward, or remuneration for any labour done or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain." Any remuneration, therefore, for the labour of the artificer, whether by the day or by the piece, is wages. Whatever is contracted to be paid for his personal labour is wages, and what is more than that is not wages.

The price of 7d. per dozen in the case before the Court is not merely wages so defined, but wages plus an addition for the work done by the stocking frame. Now, inasmuch as the frame does not belong to the artificer, he is obliged to hire a frame; and in the case under consideration, instead of hiring the frame of a stranger, the artificer hires it of his employer, at a fixed rent per week. The work of the frame is paid for by the employer to the artificer as part of the 7d. per dozen, according to the quantity of work done, and therefore is a fluctuating sum; but the rent of the frame is paid by the artificer to his employer according to time, and therefore is a sum certain. Suppose the rent of the frame *due to the employer and the compensation for the [**85] work of the frame due to the artificer were calculated on the same principle, at the same rate, and therefore amounted to the same sum—for example, suppose the rent of the frame due to the master to be 2d. per dozen, and the charge by the artificer for the work done by the frame to be also 2d. per dozen, then, the deduction being exactly equal to the addition, it would clearly appear, I conceive, that the 2d. per dozen deducted for the use of the frame did not come out of wages. But in the case under consideration, as the rent is calculated by time and the compensation for the use of the frame by the piece occasionally the hire of the frame paid by the artificer may be more than the compensation for the use of the frame received by the artificer, and the excess in such a contingency is a loss to the artificer, exactly as it would have been if he had hired the frame from a stranger. But then, on the other hand, occasionally the compensation for the labour of the frame is more than the rent of the frame, and the excess, in that event, is a profit to the artificer, again just as if the artificer had hired the frame of a stranger. When the bargain is a fair one, these contingencies are calculated to balance one another. There seems to me, therefore, nothing in such a bargain necessarily contrary to the Act of Parliament.

It is objected that sect. 23, which is a declaratory enactment, shows that wages are not to be paid or satisfied by a set-off for such things as fuel, materials, tools, implements, hay, corn, provender for a horse,

and rent; which deductions, so far as sect. 23 is explanatory and prohibitory, are mentioned as examples of what has already been made illegal by the earlier sections of the Act; and that so far as the proviso in that section is enabling, *that proviso does not apply except in certain cases, e. g. signed contracts, of which the case under consideration is not one.

I admit the difficulty which arises on this 23d section. I do not think it is answered by saying merely that the balance of what is due, after stipulated deductions, are wages; for if the word "wages" were to be understood as the net amount payable after subtracting stipulated deductions, nearly the whole Act would be frustrated. It would amount to no more than this—that the balance, after stipulated deductions of any sort, shall be paid in coin. But I think it may be a satisfactory answer to the arguments founded on the 23d section, that deductions are admissible if they really come, not out of wages properly so called, but (as in this case they do come) out of previous additions to those wages.

It is then objected that this arrangement is a transparent artifice, I do not say to evade (for that, if practicable, may be lawful), but indirectly to infringe the statute. It may be remarked, however, that the practice does not appear to be a new one, and probably originated in cases where, before the establishment of great factories, the artificer worked in his own dwelling, and in such a case a fixed periodical rent for the frame was the only security possessed by the employer against loss to himself by his frame being improperly employed by the artificer to do other people's work. Besides, I think that enough does not appear on the case to enable us to draw the conclusion that this arrangement is a mere artifice to contract to pay, or to pay, wages otherwise than in the current coin of the realm (sects. 1, 3).

The observations already made as to the deduction for the rent of the frame appear to me applicable to the deductions for the other machine, for the use of the *factory, for the winding, for the gas, and for the firing. In all those cases, as in the case of the frame, there is, first, an addition to the wages measured by the piece, and a subsequent deduction generally measured by time.

With respect to the fines the case is different. The statute is very obscure on the question whether a set-off be allowable. Sect. 23 seems to imply that a set-off is not in general to be allowed. On the other hand a set-off is not prohibited in terms, except in the single case of a set-off for goods received on account of wages (sect. 5). Looking at the limited character of that prohibition, and considering that this deduction may, perhaps, be treated as a condition in the original contract making a portion of the wages to depend on a contingency, I feel great difficulty in saying that it is prohibited. In *Chawner v. Cummings*, 8 Q. B. 311 (E. C. L. R. vol. 55), a fixed deduction of 1d. in the shilling was held to be lawful, and to be but a mode of calculating wages.

It must be admitted, however, that the statute is very difficult to construe, and is ambiguous not only on this question of fines, but also on the other question. Yet, considering that the statute has already received, in *Chawner v. Cummings*, a judicial interpretation sixteen years ago; which interpretation has been acted on ever since, and

that thousands of contracts and settlements of accounts have taken place on the faith of that interpretation ; that if these settlements are disturbed an infinite multitude of actions will be brought, and many fines become payable by persons who have trusted the authorized expounders of the statute ; I think this is a case in which the maxim "Stare decisis" ought to apply *even in a Court of error : [*88 and therefore that the judgment below ought to be affirmed.

BRAMWELL, B.—In this case we have to ascertain the meaning of an Act of Parliament. If the words were plain, it would be irrelevant to inquire as to the object or policy of the Legislature—our duty would be simply to declare what we found enacted. But there is a doubt as to the meaning of the language, in order to solve which it is proper to inquire into the probable object and policy of the statute. It may be compendiously stated to have been to provide for payment of wages in money. For this purpose it prohibits agreements for paying wages otherwise, and prohibits so paying them when a money payment has been agreed for. To insure obedience, it enables the artificer to repudiate a contract and payment contrary to its provisions, and, however fairly he may have been dealt with, to enforce payment in such case over again. It is obvious that such a provision is open to two most important objections. First, it interferes with that freedom of contract and conduct which is universally recognised as of the greatest benefit. Secondly, it enables an artificer who may have requested and received payment otherwise than in money, and who may have been benefited thereby, and most justly and kindly treated, to commit a great dishonesty by enforcing payment again. But, great as these objections are, the Legislature has thought that a preponderating benefit was to be got by encountering them ; and it may be that the ignorance, improvidence, or poverty of the working classes, as they are called—that is, those who work for wages—is such as to require the protection the statute has provided for them. But in order to see to *what that protection extends, it is necessary [*89 to see what are the mischiefs to be guarded against—the mischiefs of what is called the truck system. They seem to me three, the first two being in principle the same ; first, an employer of labour may engage a man to work for him, with a promise of apparently fair wages, part or all in goods, and then cheat him by giving him inferior goods, or goods overcharged ; secondly, he may engage him with a promise of fair wages, and then cheat him in the payment, by insisting on his taking goods inferior or overcharged as before ; and, thirdly, he may supply the man with goods beyond his wages, get him into his debt, and then have an injurious control over him. These are the mischiefs of a truck system. It is in vain to say that the master could cheat in cases where money wages were agreed for, by withholding money agreed to be paid, and that the law would redress the one wrong as readily as the other. The answer is, that such a cheat is too barefaced, and would certainly be successfully resisted ; while more or less of inferiority in the quality or value of goods might be endured, or, if contested, would give rise to more doubtful inquiries. Whether these mischiefs are worth the remedy, or whether the remedy is the best, is not the question. If it were, I, for one, should desire an opportunity of ascertaining what the results of a truck system had

been before I ventured to differ from those who had considered the matter and devised this enactment, and from the high authorities who have held that legislation against such a system is "perfectly just and equitable." (Smith's Wealth of Nations, book 1, c. 10.)

But I believe the object of the statute was that which I have mentioned; and certainly, considering the *objections to it, it ought [90] not to be interpreted loosely, more especially as it makes an infringement of its provisions a crime.

I now turn to those provisions. The 1st section provides that contracts for wages (in the trades enumerated) shall be made payable in current coin. The 2d prohibits engagements as to where or with whom wages shall be expended. The 3d section is, that wages shall be paid in coin. The 4th section gives the artificer power to recover whatever has not been paid in coin. The fifth prohibits a set-off. The 6th a cross action. The other sections may be called auxiliary, with certain exceptions which I shall have to notice.

The facts in this case are—That the defendants are hosiery manufacturers, having a factory, in which are stocking-frames, and which of course is lighted and warmed by them. They find the material, and the artificer, a frame-work knitter, makes the article. In this case the plaintiff made stocking heels, using these machines in this factory. The sum to be paid him was ascertained thus:—A sum was arrived at by putting 7d. a dozen for all the heels he had made in a week, and from that sum was deducted about 3s. 9d., and what are called fines, 4½d. a quarter of a day when the artificer does not attend. The way this 3s. 9d. is made up is, that so much is put down for the use of the machines of the defendants; so much for the room in which they are; so much because the yarn has been wound, without which it cannot be worked; so much for light and fire. I have mentioned how this 3s. 9d. is arrived at, but to my mind it is wholly immaterial. The parties arrive at that figure by a particular process, and each [91] agrees to it for particular (and probably the same) reasons *satisfactory to himself; but they might arrive at it for different reasons, or for no reason, and simply fix it at an arbitrary sum. It may be as well to remark, however, that the origin and reason of it is this—that formerly the artificer was paid 7d. per dozen heels, but he then found, either as his own or by hiring, the machines, worked them in his own house, for which of course he paid, with his own fire and lights, at his own cost. I believe the charge for the winding has some similar origin. Of course fines are necessary, or not unreasonable, to prevent loss by the machines not being used. The origin of this apparently inconvenient arrangement is, probably, that the master and artificer could not agree on the sum to be paid net per dozen, while they could agree on what was a fair equivalent for the workman having the machines, room, fire, light, &c., found for him, instead of finding them himself. Some masters and men, however, agree at 5d. per dozen net. The only other matter to observe is, that the 3s. 9d. is fixed per week, while the quantity of work done by the artificer may vary according to his industry or health, or other causes, and also according to the quantity of work the master may think fit to give him.

Now, it is obvious to my mind that this is not within any of the mischiefs I have specified. The artificer does not agree to take goods

in payment of wages; nor, having agreed for money, is made to take goods; nor can he get into debt to his master by spending more than his wages. I suppose, indeed, he would be liable if he did not make as many heels as, at 7d. a dozen, came to 3s. 9d.; but that is not by spending more than he earns, but by not earning.

If the case is within the statute, within which provision is it? Not that in the 1st section—it says, that ^[*92] "in all contracts the wages shall be made payable in coin only; and, if made payable in any manner other than in coin, the contract shall be void. Can it be said that whatever is to be paid here is not to be paid in coin? Can it be said anything is payable in another manner? Is this 3s. 9d. a payment, or any one of its items? Impossible. Then the case certainly is not within sect. 2. Then, is it within sect. 3? That says, "The entire amount of the wages earned by or payable to such artificer, &c., shall be actually paid to such artificer in current coin." Has the artificer earned any more wages? Are any more payable to him than the sum arrived at after allowing the 3s. 9d. and fines? I say, clearly not. The question reduces itself to this—what are his wages? The 7d. a dozen? or 7d. a dozen less 3s. 9d.? To my mind, clearly the latter. Can it be said his wages are 2d. a dozen more than the man who is being paid the 5d. without any deduction? Can it be supposed that, if there were no Truck Act, and no statute of set-off, he could recover 7d. a dozen? I ask, as I asked on the argument, suppose they fixed 3s. 9d. arbitrarily, without giving a reason for it, is that within this statute? If I agree with a man that he shall work for me at certain rates, first allowing in my favour 5s., is that an agreement to pay him a sum and part of it in that 5s.? Further: sect. 5 prohibits a set-off, in an action to recover wages, "by reason or in respect of any goods, wares, or merchandise had or received by the plaintiff as or on account of his wages or in reward for his labour, or by reason or in respect of any goods, wares, or merchandise sold, delivered, or supplied to such artificer at any shop or warehouse kept by or belonging to such employer." Obviously this means goods the property in which has been transferred to the artificer. It ^[*93] is impossible to say in this case that goods have been "sold, delivered, or supplied at any shop or warehouse" to the plaintiff, within the meaning of that section. The same remark applies to the next section. Sect. 8 is necessary in consequence of sect. 3.

But it is said sect. 23 shows that this case is within the statute. First, this statute, which makes the doing of what it prohibits a misdemeanor (sect. 9), ought not to be extended by implication. But it seems to me that this section shows the present case is not within the statute. It enacts that it shall not prevent the employer supplying the artificer with medicine, or fuel, or materials, tools, or implements, to be by such artificer employed in his trade, if such artificer be employed in mining. Now, such a case would have been within the letter, but not the spirit, of the statute; therefore it was excepted by this section. The miner requires tools and lights; the best for both master and artificer is that the latter should be at the expense of them;—it insures an economical use of them by him. If his master sold him those tools, as is also convenient, it would be within the

letter of the Act. His wages are fixed at a certain amount; to earn them he must, indeed, buy tools; but he acquires the property in them, may sell them if he likes, may use them when much worn, or throw them aside when little worn; their goodness and condition he alone is interested in. It is true, he cannot earn his wages without them, neither can he without his clothes and his food; but they are not, any more than those articles, a fixed sum, as here, to be taken into account in estimating his wages. He is at the risk of them, and their cost to him will vary according to his care and prudence, like the cost of his clothes and food. They *are therefore within the words of the Act, but, not being within the mischief to be prevented by it, are excepted from its provisions. But suppose the miner and master agreed it would be better that the latter should find the materials and tools at his own risk, and suppose they could not agree what piece wages should be paid, but that they could agree that, one week with another, a fair sum for candles and tools was 1*s.* more when the miner was diligent, less when he was not; and suppose, therefore, they agreed to continue the old piece work prices, but start with 1*s.* against the miner—that is the present case—would it be within the Act? I say, no. If it would, it certainly would not be within sect. 23, as no materials or tools would have been *supplied* to the miner, which means that the property has passed. The medicine supplied does not mean lent or given, to be returned, neither is that the meaning of the word as to the tools. The same reason applies to the provision as to hay, &c. An agreement to pay wages by allowing the occupation of a tenement at so much rent would be within the letter of sect. 1, but not within its spirit, and is therefore excepted. So of the rest of that section.

But sect. 25 is referred to, which defines "wages," for the purposes of the Act, to be, "any money or other thing had, or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any labour done or to be done;" and it is asked, were the benefits represented by 3*s.* 9*d.*, viz., the use of the frame and machine, fire, light, &c., given by the defendants to the plaintiff in exchange for, and as part of, the earnings of his labour or not? And it is contended that they were given by the master to the workman, and had by the workman from the master; that they were not given for *nothing, and so were given for the labour, the workman having nothing else to give, and giving nothing else. If I am right in my opinion, though I may not be able to detect it, a fallacy lurks in this argument.

I think I can show what that fallacy is; but, before doing so, I think I can demonstrate it is there. Suppose two men work for the same employer, in the same factory, having equally "the use of a frame, machine, fire, light," &c. One, A., works on the terms on which the plaintiff worked; the other, B., on the terms of being paid 5*d.* per dozen. Suppose each makes twenty-two dozen and a half heels in a week, each will be paid 9*s.* 4*1/2d.* for his work at the end of it. Now, has the employer given "the use of a frame, machine, fire, light," &c., to A. more than he has given it to B., so as to be within the Truck Act? Impossible; for, if so, every master who found any tool, or machine, or room for his workman would be within that Act. I believe carpenters always find their own tools, which are expensive

in the first instance, and require renewals and sharpening. Suppose a master employed a carpenter, who found his own tools, at 5s. a day, and another, whom he supplied with tools, at 4s. 6d. a day, would either, and, if so, which, be within the Truck Act? I do not know how the fact is, but suppose a journeyman tailor, who worked away from his master's workshop, got greater wages than one who worked at it, on account of his not occupying room, &c., would that be within the Act? It cannot be.

I say, then, some fallacy lurks in this argument; what it is I will attempt to point out. Pure wages are the price of labour alone—simple labour. As soon as a tool is used, capital is used, and if the tools are the labourer's *he is a capitalist, and part of what he receives is the profit of his capital. (Ricardo's Principles of Political Economy, c. 1, s. 3.) This may be made plain, I think. If I employ a man to thresh my wheat at so much a quarter, and he threshed it with a flail, what he receives would be called "wages," the value of the use of the flail being inappreciable in the sum he charges. But if he used a threshing machine and steam engine, what he receives would not be called "wages," but the hire of the machine and engine, with men to attend and work them. Now, let me not be misunderstood. I do not say that what the man with the flail receives, nor what the carpenter with his tools receives, nor what the working hosier who finds the frame and machine, fire, light, &c., receives, are not properly called "wages," and wages within the Truck Act. They are; the labour is the principal thing, and the flail, the tools, "the frame and machine, fire, light," &c., so subordinate and ancillary that the total price is properly called "wages." On the other hand, the tool or machine may be so much the principal thing, and the labour so subordinate and ancillary that "wages" would be an incorrect term to use to describe the total price. Nor am I proposing to draw any line where "wages" would cease to be the right word, but only to show that there is a case where the machine or tool is so the principal ingredient that the payment is principally on account of it; and, therefore, where the use of the machine or tool is of appreciable value, part of the payment to the labourer must be in respect of it; so that, when the working man finds his own "frame and machine, fire, light," &c., part of his "wages" is, in reality, a compensation for the use of them; when he does not find them, he is in no sense paid for them. *The man who works at 5d. a dozen is not, neither is the man who works at 7d. a dozen, with a fixed deduction of 3s. 9d. for the use of the frame and machine, fire, light, &c. They are not given to him, I submit, any more than the tailor's shop is given to the journeyman; any more than the tools in the case I have supposed are given to the carpenter; nor any more than a ship is given to sailors, who receive wages; nor are they, to my mind, in any sense the remuneration, recompense, or reward of his labour: they are things furnished to him to labour with.

This reasoning also seems to me to answer the argument, that if the workman has contracted with a third person to supply him with the things supplied by the master, the stocking heels would have clearly represented a value of 7d. a dozen; so they would, and so they do when they are made by the man who makes at 5d. a dozen, with

no fixed deduction of 3s. 9d., because they represent the value of the labour and the value of the use of the tools; and, therefore, the question, Can the stocking heels represent less *labour* only, or more, according as the workman hires the implements for making them from one person or another? may be safely answered, No; nor do they represent less compensation for the use of the frame and machine, fire, light, &c., in the one case than in the other.

Again: it is said, suppose the workman makes for his master only six dozen and a half heels in a week, what does the master pay for them? Sevenpence a dozen, or does he get them for nothing? I say neither; and if he makes another six dozen and a half, and gets precisely 3s. 9d., will the last 3s. 9d. be wages, and the first not, or is there any other difference, except that the last *is paid for in current coin, and the other otherwise than in current coin. I say that there is no first or last 3s. 9d. Why cannot the man who works at 5d. a dozen say the same thing—thus, “I make twenty-two dozen and a half a week; my master supplies me with frame and machine, fire, light, &c. Does he do so for nothing, or do I pay for them? Not for nothing; therefore I pay for them; but if so, I pay for them in labour, and labour only. How much? Why, their value, 3s. 9d. a week; that is to say, I make six dozen and a half a week really in payment for the frame and machine, fire, light, &c.; or I am paid for them by the supply of the frame and machine, fire, light, &c. I therefore am only paid in money for the residue, sixteen dozen, and I receive 9s. 4½d. I receive for the last sixteen dozen I make 7d. a dozen; and my case, therefore, is the same as the plaintiff's, and within the Truck Act.”

Again: could the defendants, in this case, in calculating the cost of the stocking heels, say that the first six dozen and a half had cost them nothing for labour, but only the use of the frame and machine, fire, light, &c., and the last sixteen dozen had cost them only labour, and nothing for their frame and machine, fire, light, &c.? That cannot be. Take the case of two carpenters—one, A., finds his tools, and is paid 3s. a day; the other, B., has them found by the master, and is paid 2s. 6d. a day; at the end of the week A. is paid 18s., B. is paid 15s. Has B. worked one day for nothing, or been paid for it by the use of the tools? I say neither. If not, would it make any difference that they were paid piece-work instead of day-work, and at the end of the week received, as before, 18s. and 15s. respectively? Again, I say, no. If not, would it make any difference *that B. was to be paid piece-work at the same rate as A., with a fixed deduction of 3s. per week because the tools were furnished him? I cannot think it would. That is this case.

In truth, the contract in its entirety between the parties must be looked at. The whole of the agreement of the master is the consideration for the whole of the agreement of the workman. The master is content to find the frame and machine, fire, light, &c., and let 7d. per dozen be taken as the price, if the workman is content to start with a fixed deduction of 3s. 9d. The workman is content to start with that fixed deduction if the master will find the frame and machine, fire, light, &c., and let 7d. a dozen be taken as the price. And, in truth, neither the first six dozen and a half is paid for by the use of the frame

and machine, fire, light, &c., any more than the second or any other six dozen and a half. It might equally well be said by the plaintiff, when he makes twenty-two dozen and a half a week—that is, three dozen and three-quarters daily—and receives at the end of the week 13s. 1½d. less 3s. 9d., “I have earned a sixth of 13s. 1½d., that is, 2s. 2½d. each day, but I have been paid only 1s. 6½d. a day, which, at the rate of 7d. a dozen, shows that I have been paid in money for about two dozen five-eighths only, at 7d. a dozen; therefore I have made my first one dozen and one-eighth heels really for nothing, unless paid by the use of the frame and machine, fire, light, &c.”; or he might go farther, and say, “I work twelve hours a day, therefore I am paid nothing for the first heel and one-eighth in each-hour, unless by the use of the frame and machine, fire, light, &c.” In truth, no one part of his work is paid in a way different to any other. If he makes six dozen and a half only in the week, and so at the end receives nothing, I say that the master does not pay 7d. a dozen. [*100] for them, nor does he get them for nothing. He has given to the workman the right to charge 7d. a dozen for all he makes beyond, and it might as well be said that the workman had the frame and machine, fire, light, &c., given to him for nothing as to all the heels made after the first six dozen and a half. If the workman does not avail himself of the right by making more, he has not the less had it. Suppose, by great skill and diligence, he made thirty dozen a week, is he not better off than the man paid at 5d. a dozen? Why? By having used the right. It is true that the quantity of work to be given is at the option of the master; but it is not contended that if the master contracted to give as much as the workman could do, the case would not be within the Act, but is because he does not so contract. That makes no difference in the question.

I think this answers the arguments I have referred to, but I protest against those being taken to be real grounds because I cannot answer them; and I call attention to arguments in favour of the defendants which have received no answer, viz., that whatever can be argued of this case could equally be said of the man who works at 5d. a dozen, and that though the 3s. 9d. is arrived at in a particular way, the reasons in the minds of the master and workman may be entirely different; and there is no difference in principle between this case and one where 3s. 9d. had been fixed arbitrarily, and without reference to any basis of calculation, save that 7d. a dozen, less 3s. 9d., was a fair price.

I am therefore of opinion that this case is neither [*101] within the letter nor spirit of the Act, and that there are collateral guides in the statute to the same conclusion.

Independently of that, there is the case of *Chawner v. Cummings*, 8 Q. B. 311 (E. C. L. R. vol. 55), decided now more than fifteen years ago. Since that decision the practice described in this case has been adopted in the three great counties of the trade, though not uniformly. In *Dalby v. The India and London Life Assurance Company*, 15 C. B. 365, 392 (E. C. L. R. vol. 80), the Court of Common Pleas, speaking of a case cited, say, “Though we are quite satisfied that it was founded on a mistaken analogy, and wrong, we should hesitate to overrule it, though sitting in a Court of error, if it had been constantly approved and followed, and not questioned, though many opportuni-

ties had been offered to question it." They proceed to say that it has not been acted on, but disregarded, and they overrule it. Apply those remarks to this case. The Court was satisfied the decision was wrong, yet they would hesitate to overrule it if acted on. Can this Court be satisfied Chawner *v.* Cummings, 8 Q. B. 311 (E. C. L. R. vol. 55), is wrong? As to being acted upon, it has been so to an extent that makes the consequences of reversing it frightful to contemplate. The litigation will be enormous; the temptation to fraudulent claims by artificers who have no real cause of complaint against their masters, but who can bring their cases within the present, will be irresistible and most mischievous; and persons who have acted with perfect honesty and fairness, trusting to that decision, will find themselves, by its reversal, turned into criminals, subject to indictment (sect. 9), and liable to the oppression and extortion *consequent thereon. If *102] ever there was a case in which it was better to persist in a wrong construction of a statute (if this has been wrongly construed, which I deny), this is the case.

For these reasons I think the judgment should be affirmed. I am not, that I am aware of, influenced by any prejudice against the policy of the statute, nor by any love for the character of a truck master. I think every right-minded man would wish the artificer to have his wages in the way they are most useful to him, viz. in coin, to do freely with them as he pleases; and though it may sometimes be beneficial that the master should keep a shop at which the artificer can be supplied, every reflecting person will see that is so liable to abuse that it may be better no one should be permitted to do it. Nor have I any prejudice in favour of the practice stated in this case. I think that the 3s. 9d. being fixed, though the work given to the artificer varies at the pleasure of the master, is very objectionable. I do not suppose, with my brother Hayes, there is any contrivance by which the wages of a particular trade can be permanently depressed below their natural price, but such an arrangement gives a power to harass and oppress, and practically defraud, mischievous in itself, and which, I think, no well disposed person would desire to possess.

POLLOCK, C. B.—This action is brought, under the 1 & 2 W. 4, c. 37, to recover wages alleged to be unpaid in coin, and to have been stopped or deducted by reason of a claim of the employer against the workman for room, light, heat, and the use of the implement or machine by means of which the labour of the workman *was *103] performed; and it is brought avowedly to question in this Court of error the decision of the Queen's Bench in Chawner *v.* Cummings, 8 Q. B. 311 (E. C. L. R. vol. 55). If that case was well decided, the plaintiff cannot maintain the present action.

The question turns entirely on the true construction of the statute referred to.

There is a very old rule in the construction of statutes, that a remedial law shall be construed liberally, but a penal law strictly; and occasions sometimes arise where this rule is applicable, and may govern the construction; but, whether the statute be remedial or penal, it is the duty of the Court to ascertain its true construction, according to the language used, and with reference to the subject about which it is used, and to give effect to that which they discover

to be the plain meaning of the legislature. The present statute is a very remarkable one: it is extremely stringent and prohibitory; it interferes with the common law rights of masters and servants in making their contracts, and it is in some respects penal; it renders null any payment, however honest, and any set-off, however just and correct, if contrary to the statute; its general policy and object is not avowed and declared by the legislature; it is a collection of enactments to which we are bound to give effect, but which we cannot extend, under the notion of acting in the spirit of the statute; and the question is, does the statute in any of its enactments apply to the present case?

There is nothing in the case before us to throw any doubt on the bona fides of the contract between the employer and the artificer. We must assume that this *is not an arrangement to evade or [*104] defeat the statute, but is the honest agreement between the parties; and with that assumption, which I think we are bound to make, what are the wages of the plaintiff? Certainly not the entire sum claimed, for that includes matter which is not furnished by him, but by the master. Is, then, the agreement anything more than a detail of the manner in which the wages shall be calculated and ascertained? Or is the use of the machine a mode of payment? I think not. Suppose the marketable value of the article produced were made the basis of the calculation, and there were deducted from that, first, the material of which it was composed; then the other matters mentioned in this case, and the balance remaining were taken to be the wages due, could it be said that the workman was entitled to recover the full marketable value of the article as wages, and that the value of the material was a deduction from his wages prohibited by the statute. I should say, very clearly, no. And I cannot in principle distinguish the case before us from the case here supposed. The deduction of the value of the material from the marketable value of the article is so obviously a matter of plain justice, that I cannot conceive any one acquainted with the subject entertaining any doubt about it; and the benefit the workman derives from the use of the machine and the deduction made in consequence appear to me to stand upon precisely the same footing.

I think, therefore, that the case of *Chawner v. Cummings*, 8 Q. B. 311 (E. C. L. R. vol. 55), was rightly decided, and that the judgment of the Queen's Bench ought to be affirmed.

This Court being equally divided, the judgment of the Court of Queen's Bench will be affirmed.

**Hayes, Serjt.*, for the plaintiff, asked what direction the [*105] Court would give as to costs.

POLLOCK, C. B.—The general rule is, that costs follow the affirmation of the judgment of the Court below. (a) Is there any rule as to costs in appeals to the House of Lords when the Law Lords are equally divided in opinion? *Cur. adv. vult.*

Feb. 8. *C. G. Merewether* said that the defendants did not ask for costs.

In Easter Vacation, May 14,

POLLOCK, C. B. said.—The Court being equally divided there will

(a) See *Young v. Moeller*, 6 E. & B. 681 (E. C. L. R. vol. 88).

be no costs: the judgment of the Court below is affirmed without costs.
Judgment affirmed without costs.

Notice of appeal to the House of Lords has been given.

*106] *THOMPSON and Others v. THE NORTH EASTERN RAILWAY COMPANY. [Nov. 22, 1860.]

Dock Company.—Negligence.—Ship going out of dock.—Knowledge of Pilot in charge.

In an action by the owners of a ship against the proprietors of a dock and tidal basin, made under the powers of an Act of Parliament, and for the use of which they were entitled to receive tolls, it appeared that the dock and basin were opened for public use on the 3d March, 1859.

The basin opened into the river T. between two piers, distant 120 feet apart: in constructing the basin a bank was put across it for keeping out the water during the excavation: when the excavation was completed, the operation of cutting through the bank was commenced, and, at the time of the accident to the plaintiffs' ship, a channel 70 feet wide had been cleared through the bank, opposite the middle of the space between the piers at the entrance of the basin: at the time when the dock was opened, the 70 feet channel had been excavated to about 3 feet 6 inches above the bottom of the rest of the basin, and the dredging of the channel was continued from that time until the plaintiffs' ship went out. The plaintiffs' ship, which was of 674 tons burthen, entered the dock on the 9th March, and, having received a cargo, went out on the 19th March under the charge of a river pilot, and, whilst proceeding through the basin, grounded on the bank. The channel was not marked by buoys or otherwise. The pilot, who had taken a larger ship out on the 8th March, knew the state of the basin. Held by this Court, and affirmed by the Exchequer Chamber,

1. That it was the duty of the defendants to take reasonable care to make their dock and basin safe for navigation before they opened them to the public; and therefore they were liable for negligence in opening them before the channel had been well cleared.

2. That assuming the knowledge of the state of the basin by the pilot to be the knowledge of the plaintiffs, it was no excuse for the defendants, inasmuch as they contended that the state of the basin was not such as to make it imprudent to take the vessel out; and the jury had negatived mismanagement on the part of those who had charge of the vessel.

THE first count of the declaration alleged that the plaintiffs were the owners of a vessel called The New Zealand, then loaded with a cargo of coals, and that the vessel was about to proceed from Shields to Aden, and that the defendants were the owners of a dock and a basin called "The low water basin," constructed under an Act of Parliament, and received rates from vessels navigating the dock; and that the defendants, though they well knew that the said "Low water basin" was, by the irregular depth of the bottom thereof and of cer-

*107] tain great accumulations and ridges of earth and stone across the same, in an unfit and dangerous state for vessels suffered and permitted by the defendants to navigate the same, did not take due and reasonable care to put the same in a fit state for that purpose, and negligently suffered the basin to be navigated whilst it was in a dangerous state, insomuch that the plaintiffs' vessel, whilst navigating the basin with her cargo, struck upon the irregular bottom and upon a ridge; and that the defendants further neglected their duty by suffering the basin to be open for navigation of vessels of the size and draught of water of the plaintiffs' when the basin was, as the defendants knew, in an unfit and dangerous state to be navigated by such vessels, and that by reason thereof the plaintiffs' vessel ran on a ridge.

The second count alleged that the defendants did not take due and

reasonable care in making and constructing the basin so as to be in a fit and proper state for vessels lawfully using the dock and passing through the basin, and that by their carelessness a large heap or ridge of earth and rock was left remaining in the basin, and that the plaintiffs' vessel, whilst lawfully navigating the basin, ran on such rock or ridge.

The third count was on an alleged promise on the part of the defendants, in consideration of the plaintiffs using the dock for their vessel and paying the rates, that the defendants would take reasonable care to keep and maintain the basin in a fit state to be navigated by the plaintiffs' vessel, and alleged that the vessel was lost through a breach of that promise.

The defendants pleaded, to the first and second counts, that they were not guilty: and, to the third count, thirdly, a denial of the promise; fourthly, a denial of the *breach of the agreement; and, [*108 fifthly, that the plaintiffs had notice of the state of the basin at the time their vessel was navigated through the basin, and might, by reasonable care in navigating the vessel through the basin, have avoided all damage to the vessel.

The plaintiffs joined issue on these pleas.

On the trial, before Cokburn, C. J., at the sittings at Guildhall, after Hilary Term, 1860, it appeared that the defendants were the owners of certain docks and works constructed by them near the river Tyne, under the powers of "The Jarrow Dock and Railway Act, 1854," 17 & 18 Vict. c. clxiv., and other Acts of Parliament. They consisted of a dock of two locks, one called the 80 feet lock and the other the 60 feet lock, leading from the dock to a tidal basin, through which vessels leaving the dock had, after passing through one or other of the locks, to navigate to reach the river Tyne. Plans of the dock, locks, and tidal basin were put in evidence. The plaintiffs were the owners of the New Zealand, which was a vessel of 674 tons burden. The New Zealand passed from the Tyne through the basin into the dock on the 9th of March, 1859, being then in ballast. She took in a cargo of coals in the dock for the purpose of proceeding to Aden, and on the 19th March, being then fully loaded and under the charge of Morrison, a pilot of the river Tyne, at four o'clock in the afternoon, and at the top of a spring tide, passed through the 80 feet lock into the basin; and whilst proceeding through the basin, towed by a steam tug for the purpose of passing into the river Tyne, the vessel ran aground in the basin, and though she was got off the next day, she proved nearly a total wreck, and it was for the loss of the vessel the action was brought.

*The dock was opened to the public on the 8d March, 1859. [*109 Before the dock was opened, the defendants published three printed bills; one dated March 2d, 1859, being the list of rates, tolls, and duties, payable under the Jarrow Dock and Railway Act, 1854; another, being a notice of the mooring and police charges which might be levied on all vessels entering the docks after the 4th March, 1859; and a third, dated March 3d, 1859, being rules and regulations to be observed by masters of ships, steam-boat pilots, and others. The basin is $9\frac{1}{2}$ acres in extent, and opens into the river Tyne. The opening into the river Tyne is through two pier heads or jetties, through

which there is a space of about 120 feet; the distance from the opening between the jetties to the 80 feet lock was 540 feet. In constructing the basin, a dam or bank was put across from east to west, for the purpose of keeping out the water during the excavation: when the excavation was completed, and the water was let into the dock, the operation of cutting through the bank was commenced, and continued until a channel was formed. At ordinary spring tides the depth of water at the dock sills was 24 feet 6 inches; the depth of the dock was 25 feet; the depth of the basin, as far as the bank, was 25 feet, or six inches more than at the dock sill. At the time when the dock was opened, a channel had been cleared through the bank, 70 feet wide opposite the middle of the space between the jetties at the entrance of the basin, through which vessels had to pass. Vessels going out of the 80 feet lock, had to go a little to the eastward to get into the channel, and vessels going out of the 60 feet lock, had to go a little to the westward. At the time when the dock was opened, the 70 feet channel had been excavated to about 3 feet 6 inches above *110] the bottom of *the rest of the basin, and 3 feet above the level of the dock sill, and the dredging of the channel went on from that time until the New Zealand went out, during which period 3180 tons were taken out from the basin. Between the 3d and the 19th March several vessels passed out, which were piloted out by the regular pilots. Previously to the opening of the docks the pilots used constantly to sound in the channel; there were no buoys, marks, or anything to indicate the margin of the bank, or where the channel was. It was intended to dredge away the whole of the bank, and to make the whole of the basin of the same level. The defendants opened the dock before they had completed the basin, because they considered that the water upon the bank where it had been excavated, which was 21 feet 6 inches at spring tides, would, upon the whole, for practical purposes, be quite sufficient for any vessels coming into the Tyne, and that, as on an average there was not more than 21 feet 6 inches of water upon the bar of the river at spring tide high water, if vessels could enter the Tyne at all it was quite sufficient to enable them to enter the Tyne docks. With a view to certain projected improvements in the bar of the Tyne, the level of the lock sill had been placed 3 feet below the level of the bar.

One of the plaintiffs was on board the New Zealand when she started. It had been arranged between Bullock, the deputy dock master of the defendants, and Morrison, who had been engaged by the plaintiffs to take charge of the vessel out of the dock to a certain point in the river, where the sea pilot would take charge of her, that Bullock should give him a signal when it was high water, or when the depth of water marked on the dock sill was 5 feet more than the vessel drew. When Bullock accordingly *gave the signal, the vessel started, towed by one steamer ahead and there was another steamer astern; there was a strong breeze, west-south-west, blowing; as soon as the vessel got out of the dock into the basin, the helm was put a-port, which was necessary in order to make her go to the eastward. There was conflicting evidence as to whether the vessel answered her helm before she grounded; and as to whether the chains of her rudder being fouled did not prevent her helm being put a-port.

At the time she went out of the lock the depth of water on the dock sill was 24 feet 6 inches: the depth of water on the bank in the 70 feet channel was from 3 to 4 feet less. On the 8th March, with a similar tide, Morrison piloted a vessel called The Oregon, which drew 20 feet 7 inches, out of the dock through the basin into the river; the depth of water marked on the dock sill being then 25 feet 6 inches. He took soundings in the basin before he took The Oregon out. He had seen the dredgers dredging the basin.

The Lord Chief Justice left the following questions in writing to the jury, who gave the answers put opposite each question.

Was there negligence in the defendants

1. In opening the dock and basin before the whole of the ridge or bank had been removed, and the bottom of the basin rendered of uniform level? Yes. Or was it sufficient to leave a channel of 70 feet wide between the lock gates and the jetties? No.

2. Or in suffering the basin to remain in an imperfect condition, if by reasonable diligence they might have perfected it by the time of the accident? Yes.

3. Or in permitting vessels, and especially a vessel of this burden, to navigate the basin in its then condition? Yes.

*4. In permitting them to do so without notice as to the course and extent of the channel? Yes. [*112]

If negligence in either of these particulars established, further questions necessary to be answered.

5. Did the owners of the ship, or either of them? No.

6. Or did the pilot who had charge of her know of the condition of the basin, and that there was only a particular channel in which it was necessary to keep? Yes.

7. Did the injury to the vessel arise wholly from any negligence of the defendants? Mainly. Or did it arise either in the whole or in any material degree from mismanagement or want of seamanship of those who had charge of the vessel? Not in any material degree.

8. Or from the accidental fouling of the chains? No.

9. Might the damage have been avoided by the exercise of due care and skill on the part of those who had charge of the vessel? No.

Upon these findings the Lord Chief Justice directed the verdict to be entered for the plaintiffs: but leave was given to the defendants to move to enter a verdict for them; either on the ground that under the circumstances no action could be maintained, or that on the findings of the jury the defendants were entitled to a verdict. In the following Easter Term,

Sir F. Kelly obtained a rule calling upon the plaintiffs to show cause why the verdict should not be entered for the defendants on the plea of not guilty to the first and second counts, and upon the third and fifth pleas, to the third count, on the grounds that under the circumstances the action was not maintainable; and that the *findings of the jury, and particularly the finding that the pilot in charge [*113] of the New Zealand knew of the condition of the basin, entitled the defendants to the verdict; or why there should not be a new trial on the ground that the verdict was against the evidence.

Bovill, Manisty and Cleasby showed cause, citing *Tuff v. Warman*,

in error, 5 C. B. N. S. 573 (E. C. L. R. vol. 94), and Clayards v. Dethwick, 12 Q. B. 439 (E. C. L. R. vol. 64).

Sir F. Kelly, S. Temple and Mellish, contra.

COCKBURN, C. J.—I am of opinion that this rule ought to be discharged.

With regard to that part of the rule which is grounded on the verdict being against the weight of evidence on the issue of negligence on the part of the defendants, I entirely concur with the verdict of the jury. To open a dock for vessels of large burthen as well as small when it was in such a state that at high tides the water in the basin would apparently be throughout of the depth marked upon the sill, and yet the navigable part of it for vessels of large burthen was restricted to little more than half the apparent width, without any notice to the public, and without pointing out the narrower and deeper channel by buoys or other indications, I think is negligence. Therefore I am of opinion that on this point the verdict was justified by the evidence.

With regard to the other point on the evidence,—whether the catastrophe was occasioned entirely by the negligence of the defendants, or whether it was to be attributed partly to the negligence of the plaintiffs in navigating their vessel so as to occasion the fouling *114] of the *rudder chains,—I see no reason for disturbing the verdict; more especially when one considers that even if the evidence had preponderated in favour of the defendants, in showing that the fact of the vessel not answering the helm was occasioned by the fouling of the rudder chains, that might have been the result of pure accident, without any negligence on the part of the plaintiffs, and the verdict would have been a proper one on that supposition. For if by pure accident, without any negligence in the person who sustains injury, circumstances arise which would not have been attended with disastrous results without the intervention of some obstruction or other cause, which is to be referred to the negligence of the party sought to be charged, the party guilty of the negligence is liable for the injury caused, because it is fairly attributable to his negligence, and there is no act of the other party materially conducing to it.

There remains the important question, whether the knowledge of the pilot in charge of the vessel was a circumstance which so affects the plaintiffs that it may be said that the allowing the vessel to be navigated along this channel under the circumstances of danger which had arisen by the default of the defendants was not the act of a prudent owner. The first question which arises upon this part of the case is, whether the relation of pilot and shipowner is such that the knowledge which the pilot had of the state of the basin must be taken to be the knowledge of the plaintiffs. It is not necessary to decide that question in this case; because, assuming all which the pilot knew to have been known by the plaintiffs, that knowledge would not preclude the right of the plaintiffs to recover in the present action. Clayards v. Dethwick, 12 Q. B. 439 (E. C. L. R. vol. 64), is a direct authority *115] that where *danger has been created by the wrongful or negligent act of another, if a man, in the performance of a lawful act, voluntarily exposes himself to that danger, he is not precluded from recovering for injury resulting from it, unless the circumstances

are such that the jury are of opinion that the exposing himself to that danger was a want of common or ordinary prudence on his part. Now that issue was not proposed by the defendants to be put to the jury. They stood upon the fact that the knowledge of the state of the basin by the pilot was the knowledge of the plaintiffs, and was in point of law an answer to their claim. But that is not so, unless the circumstances were such that the attempt to navigate the ship under them was an act which no man of ordinary prudence would have committed ; and to raise that issue would have been altogether inconsistent with the case which the defendants were most anxious to establish, viz., that there had been no negligence whatever on their part. We must dispose of the case on the facts found by the jury, and on those facts I am of opinion that the knowledge of the pilot (assuming that it was the knowledge of the plaintiffs) was not enough to defeat the claim of the plaintiffs.

HILL, J.—I am of the same opinion. The first question is whether there was evidence to warrant the jury in finding that the defendants were guilty of negligence in the performance of the duty cast upon them. It is important first to see what that duty was. The defendants are a Company, empowered by Act of Parliament, to construct docks for the use of the public, and to "take tolls from those who use the docks, and to appropriate those tolls to their own purposes." [*116 Gibbs v. The Trustees of the Liverpool Docks, 3 H. & N. 164, and in Parnaby v. The Lancaster Canal Company, in error, 11 A. & E. 228, 230 (E. C. L. R. vol. 39), there cited. In the last-mentioned case Tindal, C. J., in delivering the judgment of the Court, said (pp. 242, 243), "The Company made the canal for their profit, and opened it to the public upon the payment of tolls to the Company: and the common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property." The duty of the defendants, therefore, was to take reasonable care that their dock and basin were kept so free from obstruction that those who used them might do so without danger to their property. It was proved that an obstruction was left across a considerable portion of the tidal basin, directly and materially interfering with the navigation ; and it was a question of fact for the jury whether the leaving that obstruction was or was not an act of negligence on the part of the defendants, looking at negligence by the light of the expressions used by the Court of Exchequer Chamber, in the passage which I have read. The evidence appears to me abundantly to warrant the verdict given by the jury on that point.

The next question is, whether the knowledge of the pilot of the state of the basin disentitled the plaintiffs from recovering in the action. I subscribe to all that the *Lord Chief Justice has said upon that point. We do not decide that the knowledge of the pilot [*117 was the knowledge of the plaintiffs ; but, assuming that it was, there is nothing in the evidence to show that the pilot had such knowledge as would have prevented a man of ordinary prudence from attempting

to take the vessel out of the docks. The pilot had knowledge of the fact of the obstruction, but he had not knowledge that it made the navigation so highly dangerous as to render it inconsistent with the exercise of ordinary prudence to make the attempt.

BLACKBURN, J.—I also am of the same opinion. The duty imposed by law upon a Company in the position of the defendants is laid down in the passage read by my brother Hill, from the judgment of the Court of Exchequer Chamber, in *Parnaby v. The Lancaster Canal Company*, in error, 11 A. & E. 242, 243 (E. C. L. R. vol. 39). That doctrine is binding upon us, and I fully agree with it. The duty of a dock or canal Company is to keep their dock or canal in such a state as to be reasonably safe for navigation by that class of vessels for which they hold it out as fit and ready. The question whether there was negligence on the part of the defendants in this respect was a question of fact for the jury, and there was ample evidence of it. So also was the question whether there was negligence on the part of those who navigated the plaintiffs' vessel, and with the finding of the jury upon that the Lord Chief Justice is not dissatisfied.

The remaining question is; assuming the plaintiffs, the shipowners, to be so far identified with the pilot for the purposes of the present case as to make his knowledge *their knowledge; whether his knowledge of the state of the basin, and the depth of water in it, disqualifies the plaintiffs from recovering for the damage they sustained by the negligence of the defendants in not making the basin reasonably safe for the navigation of the vessel. On this point I perfectly concur with what has been said by the Lord Chief Justice and my brother Hill; the point is, in fact, decided by *Clayards v. Dethwick*, 12 Q. B. 439 (E. C. L. R. vol. 64). It might have been a question to be left to the jury, whether the pilot, with the knowledge which he possessed, was guilty of such want of reasonable care, in attempting to take the ship out, as that no prudent man would have so acted. But no such issue was raised by the defendants; on the contrary, they strongly contested the state of the basin being improper, and urged that the fact of the pilot having taken out a larger vessel safely ten days before showed that there was no danger; it would, therefore, have been felt as a sarcasm on the case which the defendants were maintaining if the Judge had asked the jury, in favour of the defendants, whether the pilot, with his knowledge of the state of the basin, was acting as an unreasonable and imprudent man in taking the vessel out. That was a question which, from the course of the trial, my Lord could not be expected to ask the jury. And the rule was not obtained on any such ground. Rule discharged.

*IN THE EXCHEQUER CHAMBER. [*119]

THOMPSON and Others v. The NORTH EASTERN RAILWAY COMPANY. Feb. 1.

For head-note, see ante, p. 106.

THE defendants having appealed from the above decision, the case was argued by

Sir F. Kelly, for the appellants.—It is not proposed to question the rule laid down in *Parnaby v. The Lancaster Canal Company*, in error, 11 A. & E. 223, 230 (E. C. L. R. vol. 39), and *Clayards v. Dethwick*, 12 Q. B. 489 (E. C. L. R. vol. 64). There is, however, a distinction between the present case and those cases, as well as every other case of negligence which has come before the Courts. In *Clayards v. Dethwick* the leaving the trench open without putting up a fence, and the throwing a quantity of rubbish on the adjacent ground, were wilful acts which rendered the defendants liable. In *Parnaby v. The Lancaster Canal Company*, in error, 11 A. & E. 223, 230 (E. C. L. R. vol. 39), and *Gibbs v. The Trustees of the Liverpool Docks*, 3 H. & N. 164, there was an obstruction which the Company were bound to remove. But in this case, the defendants having obtained an Act of Parliament for the construction of docks, and no time being fixed at which they were bound to open them, they simply opened them before they were in a condition to receive vessels of the largest size. Assuming that, from the existence of the bank, there *was [*120] some danger to such vessels coming in or going out of the docks, this is not the case of a dock in use by the public, in which an impediment arose, which the Company were bound to remove. The existence of this bank was lawful, and was necessary to keep out the water of the river Tyne, while the basin was being excavated. There was no failure on the part of the defendants to do any act which the law imposed on them. It was not incumbent on them to keep the docks closed until the basin was finally completed, provided they omitted nothing which they were bound to do, with reference to vessels of a large size passing through the basin for the purpose of entering or leaving the dock.

Further, notice of the state of the basin, and of the channel through it, to the pilot on board the ship, was notice to the owners of the ship. The presence of one of the owners on board is immaterial. No inference can be drawn from the printed bills that the defendants would be responsible for the safety of all vessels, whatever might be their tonnage.

Bovill, for the plaintiffs, was not called upon.

ERLE, C. J.—We are all of opinion that the judgment of the Court below ought to be affirmed.

The ship of the plaintiffs was damaged in coming out of the defendants' docks, which had been opened for public use, and declared by them to be fit for vessels of the largest size. It must be taken that the ship was damaged by reason of the state of the channel through which it had to pass, and not by any fault of the plaintiffs. The jury found that the defendants were guilty of negligence in opening the dock and basin *before the channel was in a fit state; and the meaning of the particular negligence attributed to the defend- [*121]

ants is well expressed in the judgment of Hill, J., in the Court below; when he said that their duty was "to take reasonable care that their dock and basin were kept so free from obstruction, that those who used them might do so without danger to their property."(a) That was the meaning of the second question put to the jury in this case, "Was there negligence in the defendants in suffering the basin to remain in an imperfect condition, if, by reasonable diligence, they might have perfected it by the time of the accident?" The jury have found that there was.

We were pressed with a distinction said to exist between this case and Gibbs *v.* The Trustees of the Liverpool Dock Company, 3 H. & N. 164, and Clayards *v.* Dethwick, 12 Q. B. 439 (E. C. L. R. vol. 64), But Gibbs *v.* The Trustees of the Liverpool Dock Company, 3 H. & N. 164, and Parnaby *v.* The Lancaster Canal Company, in error, 11 A. & E. 228, 230 (E. C. L. R. vol. 39), are exactly parallel to this case; and in our judgment it does not matter whether the obstruction in the channel had grown up after the dock and basin were opened, or whether the dock and basin were opened before the channel was well cleared. Strangers cannot be supposed to know the state of the dock, and the Company who open their dock are bound to take reasonable care to make it safe for navigation by those who use reasonable care in navigating it.

A great deal was said about the knowledge of the pilot in charge of the vessel, as to the state of the channel. The answer was given in the Court below. No reliance was placed, by the defendants, on the knowledge of the pilot; because they contended that the *122] state *of the basin was not such as to prevent a man of ordinary prudence from attempting to take the vessel out. Moreover, this argument cannot avail, because the jury found that there was no mismanagement on his part when the vessel received damage.

Notwithstanding the argument of Sir Fitzroy Kelly I think that the judgment ought to be affirmed, for the reasons assigned in the Court below.

POLLOCK, C. B., WILLIAMS, J., CHANNELL B., and KREATING, J., concurred.
Judgment affirmed.

(a) *Ante*, p. 116.

THOMAS HAYDON HARRISON *v.* The LONDON, BRIGHTON and SOUTH COAST RAILWAY COMPANY. [May 29, 1860.]

Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, s. 7.—Special contract.—Unreasonable condition.—Carriage of animals.—Extra charge.—Negligence.

'A passenger by railway from L. to W., took with him two horses and a retriever dog; the horses were put into a horse-box, and a servant of the defendants proposed that the dog should be placed in the horse-box, to which the plaintiff assented. The dog was fastened in the horse-box by means of a leather collar round its neck, and a strap thereto, which passed through a ring fixed to the side of the horse-box; the collar and strap were furnished by the plaintiff, and were his property. The plaintiff's agent signed a ticket, subject to the following conditions: "The company will not be liable in any case for loss or damage to any horse or other animal above the value of 40/-, or any dog above the value of 5/-, unless a declaration of its value, signed by the owner or his agent at the time of booking the same, has been given to them, and by such declaration the owner shall be bound, the Company not being in any event liable to any greater amount than the value so declared. The Company will in no case be liable for

injury to any horse or other animal or dog, of whatever value, when such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*, the price of conveyance will, in addition to the regular fare, be after the rate of 2*½* per cent., or 6*d.* in the pound, upon the declared value above 40*l.* [or 5*l.*], whatever may be the amount of such value, and for whatever distance the horse or other animal is to be carried." The plaintiff made no declaration of the value of the dog, and paid 3*s.* for the carriage of it. On the arrival of the train at W. a window in the horse-box was found open, through which the dog had escaped, and was lost. The Court having power to draw inferences of fact,

1. Held by this Court, and affirmed by the Exchequer Chamber, that the loss of the dog was not occasioned by neglect or default of the plaintiff, or of the defendants.

2. Held, per Cockburn, C. J., and Blackburn, J., that a dog is one of the animals to which the proviso in sect. 7 of The Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, relates; and, per Wightman, J., and the Exchequer Chamber, that the defendants had made themselves liable as common carriers for carrying the dog.

3. Held, per Cockburn, C. J., and Blackburn, J., that the conditions in the ticket were not just and reasonable within that section, in two respects: first, because the meaning of the ticket was, that if the value of the dog exceeded 5*l.*, and its value was not declared, the Company would not be liable for loss or damage occasioned by their own negligence: secondly, because, in the absence of evidence by the Company showing the contrary, the extra charge of 2*½* per cent. was excessive; and therefore, the conditions being void, the Company were liable, as common carriers, for the full value of the dog. But, per Wightman, J., the meaning of the ticket was that the Company would not in any case be liable for loss or damage beyond 5*l.* unless the value was declared, and that this was a reasonable condition; and that the Court had no means of ascertaining whether the extra charge of 2*½* per cent. was reasonable or not, and therefore the plaintiff was not entitled to recover more than 5*l.*

4. Held by the Exchequer Chamber, Erle, C. J., Williams and Keating, J.J., and Channell, B., reversing the judgment of the Queen's Bench (Wilde, B., dissentiente), that, assuming sect. 7 applied to the case, the conditions in the ticket were just and reasonable within that section; because the effect of the first condition was not to exempt the defendants from liability for loss or injury occasioned by wilful wrong; and if it exempted them from responsibility for any negligence it was severable, and valid to exempt when there was no negligence; and it lay upon the plaintiff to show that the extra charge in the third condition was exorbitant or unfair, and the question whether it was so was for a jury, and not for the Court.

5. Held by Erle, C. J., and Keating, J., that sect. 7 was confined to cases in which the loss or injury was occasioned by misconduct on the part of the Company, and did not apply where it occurred through pure accident.

THE declaration stated that the defendants were the owners and proprietors of The London, Brighton and South Coast Railway, and common carriers of goods for hire on the said railway; and the plaintiff caused to be delivered to the defendants, and they accepted and received of and from the plaintiff, a certain dog, to wit, a retriever of the plaintiff, of great value, to be safely carried and conveyed by them as such common carriers from the defendants' station at London Bridge to Worthing, and there safely and securely to be delivered for the plaintiff within a reasonable time, for certain reasonable reward to the defendants in that behalf: Yet the defendants, not regarding their duty as such common carriers, did not nor would safely or securely carry or convey the *said dog from the defendants' station at London Bridge to Worthing, and there deliver the [*124] same for the plaintiff; and by reason of the breach of duty, carelessness, negligence and default of the defendants in the premises, the said dog became and was wholly lost to the plaintiff: and the plaintiff claims 21*l.*

Pleas: 1. Not guilty.

2. That the plaintiff did not cause the said dog to be delivered to the defendants, nor did the defendants accept or receive the same of or from the plaintiff, upon the terms or for the purposes in the declaration in that behalf alleged.

3. That the plaintiff caused the said dog to be delivered to the defendants, and the defendants received the said dog from the plaintiff, to be carried and conveyed by the defendants in their railway, to wit, from and to the places in the declaration mentioned, under and subject to certain conditions and a certain contract, signed on behalf of the plaintiff by the person delivering such dog for carriage as aforesaid, whereby it was provided and agreed by and on behalf of the plaintiff, and whereby the defendants gave him notice, that the defendants should not nor would be liable in any case for loss or damage to any dog above the value of five pounds, unless a declaration of its value, signed by the owner or his agent at the time of booking, should have been given to them; and that the said dog in the declaration mentioned, before and at the time it was so delivered to and received by them for carriage as aforesaid, and afterwards while the same was on their railway for carriage, was a dog of a value above five pounds, to wit, of the value of ten pounds, and that no declaration of the value of the said dog signed by the owner or his agent was given *125] to them at the time of booking the said dog, or at any time before or afterwards.

4. That the dog in the declaration mentioned was received by the defendants from the plaintiff, to be carried by the defendants for the plaintiff, on their railway, from their station in the declaration mentioned to Worthing, subject to a certain special contract signed on behalf of the plaintiff by the person delivering the said dog for carriage as aforesaid, at the time of such delivery, whereby it was provided and agreed, and the plaintiff had notice, that the defendants should and would in no case be liable for injury to any dog, of whatever value, where such injury arose wholly or partially from fear or restiveness. And that the injury to the dog, whereby the same became and was lost to the plaintiff, as in the declaration mentioned, happened and arose from the fear and restiveness of the said dog while on the defendants' said railway for carriage as aforesaid.

Issues on all the pleas.

On the trial, before Lord Campbell, C. J., at the Sittings in London after Hilary Term, 1859, a verdict was found for the plaintiff for 21*l* damages, subject to the following case.

On the 29th October, 1858, the plaintiff, accompanied by his brother, Daniel Alfred Harrison, proceeded to the terminus station of the defendants at London Bridge, for the purpose of travelling as a passenger on the defendants' line of railway from London to Worthing. He took with him two horses and the dog mentioned in the declaration, to be conveyed by the defendants on their railway to Worthing, and delivered them to the defendants' servants for that purpose at the said station; and at the same time Daniel Alfred Harrison, on behalf of the plaintiff, paid to the defendants the sum charged by them for *126] the carriage of the two horses and the dog from London to Worthing; and also, at the request of the defendants, signed at the time of booking the horses and dog, and as agent of the plaintiff, the owner thereof, a printed ticket or paper, in the form required by the Company to be signed by persons sending horses or dogs by their railway. The ticket was as follows:—

"London, Brighton and South Coast Railway.

"Horse, carriage, and dog ticket.

"No. 2249—12 o'clock train.

"October 29, 1858.

"From London to Worthing.

		"Amount paid. £ s. d.
"2 horses		1 12 0
"4 wheel carriage		1 1 0
"2 wheel carriage		0 8 0
		<hr/>
		£2 16 0

"Name. Harrison.

"Received the annexed ticket subject to the following conditions:—

"The Company will not be liable in any case for loss or damage to any horse or other animal above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner or his agent at the time of booking the same, has been given to them, and by such declaration the owner shall be bound, the Company not being in any event liable to any greater amount than the value so declared. The Company will in no case be liable for injury to any horse or other animal or dog, of whatever value, when such injury arises wholly or partially from fear or restiveness. If the *declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*, [*127 the price of conveyance will, in addition to the regular fare, be after the rate of 2½ per cent., or 6*d.* in the pound, upon the declared value above 40*l.* [or 5*l.*], whatever may be the amount of such value, and for whatever distance the horse or other animal is to be carried.

"DANIEL A. HARRISON,

"The owner, or on the owner's behalf.

"A. G. S., Booking Clerk."

And at the same time a ticket was delivered to Daniel Alfred Harrison, as agent for such owner, which was a duplicate of the above. No declaration of the value of the dog was made. The plaintiff requested one of the porters in the service of the defendants to place the dog in the train, then about to proceed from London Bridge to Worthing, and to put it into a dog-box. The dog-boxes ordinarily used and furnished by the defendants for the carriage of dogs upon their railway are placed under the seats of the second-class carriages used by the defendants for the conveyance of passengers, of which dog-boxes there were some in this train; but the porter suggested that it would be better to place this dog in the same horse-box in which the two horses of the plaintiff had been placed, and in which they were to travel on the journey from London to Worthing. The plaintiff made no objection, and the dog was accordingly placed in the same horse-box with the horses of the plaintiff, and fastened in the horse-box by means of a leather collar round its neck, and a strap thereto, which was passed through a ring fixed to the side of the horse-box: the collar and strap were furnished by the plaintiff, and were his property. The horse-box was attached by the defendants'

*128] servant *to the train, which started immediately afterwards, under the conduct of the defendants' servants. At the time when it left the London Bridge Station both the doors and windows of the horse-box were shut and fastened in the usual manner, and the plaintiff travelled as a first class passenger by the same train from London to Worthing. On the arrival of the train at the Worthing Station, it was found that the window of the horse-box was half open, and that the dog had escaped through it. The hook to which the dog had been fastened remained fixed in the horse-box, and the strap by which the dog had been fastened thereto remained fastened to the hook, but the collar was gone. The horse-box was one of those ordinarily used by the defendants for the conveyance of horses on their line of railway; opening with doors at the side, and with windows having wooden shutters, which slide backwards and forwards and are of light construction, either secured with a catch, or if not secured with a catch, made heavy and to work stiffly, which is a sufficient fastening. The shutters of the horse-box in which the dog was placed were not fastened, and opened very easily; the windows of it were about four feet four inches from the floor, and were about two feet six inches square, and for the purpose of opening them the shutters have a small hole sufficient to admit three fingers. None of the defendants' servants opened the window, nor did any of such servants see any one open it, but there is no doubt that the dog escaped through the window, and that, if placed in one of the ordinary dog-boxes above mentioned, he would not have escaped. The dog, which was a retriever, and of the value of 21*l.*, was lost by the means aforesaid; and the plaintiff, having applied to the defendants to make satisfaction for the loss, which they refused, brought this action.

*129] The plaintiff, amongst other things, objected that the condition relating to dogs above 5*l.* in value, contained in the notice and ticket, was not just and reasonable, or binding on him; and that, if it were binding, it did not extend to a loss by negligence; and that in any case he was entitled to recover 5*l.* It was agreed that the Court might draw any inferences a jury might draw from the facts stated, and make any necessary amendments in the pleadings. The question for the opinion of the Court was, whether the plaintiff was entitled to recover in this action; and if the Court should be of opinion that he was, then the verdict was to stand for the plaintiff for 21*l.*, or 5*l.*, as the Court might direct; but if the Court should be of a contrary opinion, then the verdict was to be entered for the defendants.

Joseph Brown, for the plaintiff.—First, the defendants were guilty of negligence in two ways. They put the dog into a horse-box the window of which was not properly secured; and it has been decided in *M'Manus v. The Lancashire and Yorkshire Railway Company*, on appeal, 4 H. & N. 327, that the providing an improper carriage for the conveyance of live stock is negligence in a railway Company. Also, they did not fasten the dog in a proper manner by a proper collar. And there was no negligence of the plaintiff contributing to the loss. He did not know that the horse-box was not a proper place for carrying the dog, and consequently there was no fault in his not

objecting to it being put there; and he was not bound to provide a proper strap for fastening the dog in the horse-box.

"Secondly, assuming that there was no negligence in the defendants, they are not protected from liability by the signed contract, as it contains conditions which are unjust and unreasonable. [*130]

Sect. 7 of "The Railway and Canal Traffic Act, 1854," 17 & 18 Vict. c. 31, which was passed for the protection of the public, makes a contract with such conditions absolutely "null and void," and consequently the defendants remain liable to the plaintiff upon their common law liability as carriers. And by the first proviso it is for the Court to say whether the conditions of any contract are just and reasonable. [He also cited *Simons v. The Great Western Railway Company*, 18 C. B. 805, 829 (E. C. L. R. vol. 86), *M'Manus v. The Lancashire and Yorkshire Railway*, on appeal, 4 H. & N. 327, 348, 349.] Reading the first and third conditions together, the meaning of the ticket which the plaintiff's agent was required to sign is that if the value exceed 5*l.* the defendants will not be liable in any case for loss or damage unless the value be declared, and the extra charge on the declared value be paid. The ticket cannot be read as if it contained two separable conditions—one exempting the defendants from liability for their own negligence if the value is not declared, and the other as stating the terms on which they will be liable as insurers. Nor is it necessary to contend that, if the ticket contained two conditions, one of which was reasonable and the other unreasonable, the whole would be void. The condition which professes that the Company will not be liable "in any case for loss or damage," unless certain things are complied with, exempts them from liability *for loss occasioned by their own negligence—it is the same as the protection given by the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, s. 1: *Hinton v. Dibbin*, 2 Q. B. 646 (E. C. L. R. vol. 42). This was the construction put upon such a contract; before stat. 17 & 18 Vict. c. 31, in *Austin v. The Manchester, Sheffield and Lincolnshire Railway Company*, 10 C. B. 454 (E. C. L. R. vol. 70), *Carr v. The Lancashire and Yorkshire Railway Company*, 7 Exch. 707, *Austin v. The Manchester, Sheffield and Lincolnshire Railway Company*, 18 Q. B. 600 (E. C. L. R. vol. 71); and since stat. 17 & 18 Vict. c. 31, in *Simons v. The Great Western Railway*, 18 C. B. 805, 829 (E. C. L. R. vol. 86), and *McManus v. The Lancashire and Yorkshire Railway Company*, 4 H. & N. 327, 348, 349, reversed, on appeal, *Erle, C. J., dissentiente*. The second condition, as to fear and restiveness, applies only to a case of injury and not to a case of total loss; and even if that condition does apply to a total loss, there is no evidence that the escape of the dog from the carriage arose from fear or restiveness. [BLACKBURN, J.—*Mac-Andrew v. The Electric Telegraph Company*, 17 C. B. 3 (E. C. L. R. vol. 84), shows that if a bona fide reasonable alternative is offered to the person bringing goods to be carried, there is nothing unreasonable in the Company saying that they will not be liable at all unless that alternative is complied with.] The alternative offered here by the third condition imposing an extra charge of 2½ per cent. on the declared value for the carriage of a dog of above a certain value is unreasonable: it amounts to a prohibition against dogs exceeding 5*l.* in value being carried on the defendants' line: add to which the

*136] *point, because he did not declare the value: if he had done so, the Company might have said that they would not make the extra charge in this instance.

Lastly, a dog is not an animal within stat. 17 & 18 Vict. c. 31, s. 7, which enacts, "every such Company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals . . . occasioned by the neglect or default of such Company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability." In the construction of statutes where general words follow particular ones, the rule is to construe them as applicable to persons or things *eiusdem generis*: *Sandiman v. Breach*, 7 B. & C. 96, 100 (E. C. L. R. vol. 14), per Lord Tenterden; *Rex v. The Inhabitants of Whitnash*, 7 B. & C. 596, 601, per Holroyd, J. [He also cited *Whitmore, appt., v. Bedford, respt.*, 5 M. & G. 9 (E. C. L. R. vol. 44).] Therefore a dog is not included within the words "other animals." Then follows a proviso that nothing herein contained "shall be construed to prevent the said Companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried to be just and reasonable:" which shows that some animals were intended to be within the section, and some not. The next proviso is, "that no greater damages shall be recovered for the loss of or for any injury done to any such animals, beyond the sums hereinafter mentioned;" and then a maximum sum is fixed "for any horse," "for any neat cattle," and "for *any sheep or pigs," *137] unless the value is declared, in which case the Company may charge a reasonable per centage or increased rate of charge upon the excess of value so declared. This enumeration excludes other animals. By the construction contended for on the other side, the section is divided into two parts: the enacting part and first proviso relate to all animals, and the second proviso only to four specified kinds of animals. This section interferes with the right of parties to make their own contracts; and when the protection which Companies sought to obtain by notices limiting their liability was taken away, the proviso introduced by way of compensation in the case of the conveyance of animals would be co-extensive with the enacting part, and embrace all the animals intended to be within the enacting part. The two remaining provisos, one throwing "the proof of the value of such animals," &c., upon the person claiming compensation, and the other that no special contract "respecting the receiving, forwarding, or delivery of any animals . . . as aforesaid" shall be binding unless signed, must also be construed as applying only to the four specified kinds of animals. The Legislature had in their contemplation such animals as travel along the road and are dealt with in turnpike Acts. In all the cases decided upon claims for compensation for injury to animals, they have belonged to the class which may be called animals of commerce. It would impose a great difficulty on the Court or Judge to determine what is a reasonable condition with respect to the conveyance of strange animals.

Joseph Brown, in reply.—As to the last point, sect. 7 *of stat. 17 & 18 Vict. c. 31, applies to all animals usually carried on a railway; the proviso must be read as if the words were “any of the animals hereinafter mentioned.” There is the same reason for protecting the public with reference to the conveyance of dogs, poultry and asses, as other animals. Then the onus of showing the reasonableness of the extra charge is on the defendants—all the circumstances are peculiarly within their knowledge—they can tell how many dogs on an average they carry in a given period, and how many on an average are injured, and to what costs and expenses they are put.

[*WIGHTMAN*, J.—If the Company make an unreasonable extra charge, might not a person who had declared the value offer a reasonable sum, and require them to carry at that rate?] If the plaintiff had refused to pay the extra charge, the Company would not have carried this dog. *Lyon v. Mells*, 5 East 428, was decided before the Carriers’ Act, 11 G. 4 & 1 W. 4, c. 68, under which carriers may limit their responsibility even in case of negligence. In *Phillips v. Clark*, 2 C. B. N. S. 156 (E. C. L. R. vol. 89), the stipulation was not that the carrier would not be responsible for leakage or breakage “in any case,” or “however caused.”

COCKBURN, C. J.—I am of opinion that our judgment ought to be given for the plaintiff. At the same time I think it right at the outset to say that, upon the facts stated in this case, we should not be justified in drawing the inference that there was actual negligence on the part of the Company. My judgment proceeds upon the ground that the ticket by which the Company proposed to convert their common law contract into a special one *is void, and that therefore [*139] their liability is that of common carriers at common law, un-restricted by the terms introduced into the ticket.

Before stat. 17 & 18 Vict. c. 31, a railway Company could have restricted their liability as carriers at common law by entering into special contracts. The case cited by Mr. Brown, decided on the Carriers’ Act, 11 G. 4 & 1 W. 4, c. 68, and the cases decided independently of that Act with reference to special contracts entered into by railway Companies, establish the proposition that it was open to them to restrict their liability by notices within much narrower limits than those to which it extends at common law. But the consequence of those decisions was that the Legislature interposed. They thought (and I cannot but think wisely) that railways being in many instances the only means of carrying goods which modern convenience admits of, it would be for the public benefit to interfere by no longer permitting railway Companies to maintain, as they had succeeded in doing, the broad proposition, “We will by contract exempt ourselves from liability for our own negligence.” Accordingly stat. 17 & 18 Vict. c. 31, s. 7, on which the question in this case arises, was passed. That section enacts in substance that it shall not be competent for a railway Company to limit their liability in respect of loss or injury arising from their own negligence, unless the circumstances, under which they seek to restrict their liability make it just and reasonable for them to do so: and the conditions must be such “as shall be adjudged by the Court or Judge, before whom any question relating thereto shall be tried, to be just and reasonable.”

The first question is, whether this case is within sect. 7 of stat. 17 & 18 Vict. c. 31. It was ingeniously put by *Mr. Spinks that *140] a dog is not one of the animals to which sect. 7 relates. On looking at the strange phraseology of the section, there may be some little doubt whether it can be satisfactorily concluded that it does embrace this case; but to avoid the inconsistencies into which one would be driven by an adherence to the literal language, the better way is to take refuge in the solution suggested by my brother Blackburn during the argument, that the proviso specifies compensation for the loss of or injury done to "any of the following of such animals;" and this will give a reasonable construction to the section.

If so, a dog is within this section; and then the next question which arises is, was it intended by the Company, by means of this notice, which was given with a view to limit their liability with reference to the carriage of a dog, to secure to themselves immunity if damage should arise from their own negligence? I think the language of the notice is quite wide enough to admit of that construction: the words "in any case" comprehend the case of negligence. But this does not rest on first impression. Our attention has been drawn to several instances in which, under the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, and since, notices in this general form have been held to be applicable to loss or injury from negligence. Therefore the Company, by this ticket, did intend to protect themselves, in respect of the carriage of the dog, from liability for loss or injury arising from their own negligence. Consequently the case is within sect. 7 in these two respects.

Then the question arises, is the notice reasonable? I think that *141] several considerations make it *unreasonable. The Company are to be liable for loss or injury "notwithstanding any notice, condition or declaration made and given by such Company contrary thereto, or in anywise limiting such liability," if occasioned by the neglect or default of the Company or its servants. Then follows the proviso that "nothing herein contained shall be construed to prevent the said Companies from making such conditions with respect to the receiving, forwarding and delivering of any of the said animals, articles, goods or things as shall be adjudged by the Court or Judge, before whom any question relating thereto shall be tried, to be just and reasonable." The qualification or proviso on the previous enactment is, that the Company may limit their liability by conditions, which the Court or a Judge shall adjudge to be reasonable. I think that the burden lies upon the Company of making out the affirmative of the proposition that the conditions, which they seek to introduce, for limiting their liability in respect of negligence, are reasonable. What then are the facts? The charge is 3s. for the carriage of a dog of the value not exceeding 5l., and if the value exceeds 5l., they put on 2½ per cent. on the value beyond 5l., or 6d. in the pound, which would make the charge two-thirds higher in amount than the ordinary charge for the carriage of a dog. At first sight, that looks like an excessive and exorbitant additional charge, though it may not be so. The Company could not charge 3s. for carrying a dog under the value of 5l. and 11s. for a dog above the value of 5l. I presume that there is a maximum rate of charge, and that the charge of 10s. would be much above the maximum charge which they could make; if not,

our attention *would have been drawn to it. Mr. Spinks [*142 argued that the extra charge was in the nature of insurance. It may be, that, under special circumstances connected with the conveyance of dogs, $2\frac{1}{2}$ per cent. would not be excessive as insurance; but, in the absence of evidence on the part of the Company, it being incumbent on them to make out the reasonableness of the extra charge stated in the condition, by which their liability is to be limited, I cannot adjudge that this condition is a reasonable one. The effect is, that the condition precedent, imposed by the Legislature on railway Companies proposing to exempt themselves from their liability as carriers at common law, is not fulfilled, and therefore the ticket is void.

Mr. Spinks, who argued the case very ably for the Company, also argued that the conditions in the ticket were divisible, and that the first condition was reasonable; which amounted to this, that if the dog was of less value than 5*l.* a declaration of the value need not be made, but that if it was of more value than 5*l.* a declaration of the value must be made and signed by the owner or his agent on booking it, otherwise the Company would not be liable in any case to a greater amount than the value declared. If the ticket stopped there, and this condition stood alone, I do not know that it might not be a reasonable condition. When the value of an article of the same kind varies materially, it may be reasonable that the carrier should be entitled to call upon the person desiring to have it conveyed to declare the value, in order that he may take such extra care as shall insure him against the contingency of being called upon to make good loss or damage occurring *in the conveyance of the article. But [*143 when the ticket is looked at as a whole, as I think it must be in order to arrive at its true construction, I can come to no other conclusion than this, that the Company mean to say, "If your animal is of greater value than 5*l.* you must declare the value, and you must pay, in addition to the regular fare, $2\frac{1}{2}$ per cent., or 6*d.* in the pound, upon the excess in the value above 5*l.*;" and practically the effect would be, that if the owner were to say, "The value of my dog is above 5*l.*, but I decline to pay an unreasonable extra charge for insurance," the Company would say "You may go, but we shall not carry your dog." It is unreasonable that we should speculate upon what a Company might possibly do in such a case. That brings us back to the question whether the extra charge is reasonable or not. I think it is unreasonable in default of proof to the contrary. Consequently the defendants have failed to show a good condition, on which alone stat. 17 & 18 Vict. c. 31, authorizes them to restrict their common law liability; and the ticket by which they sought to restrict their liability failing, they are altogether unprotected against the claim of the plaintiff in respect of the loss, just as if they had contracted to carry as common carriers without any notice. Therefore the plaintiff is entitled to recover the full value of his dog independently of any question of negligence.

I think that stat. 17 & 18 Vict. c. 31, s. 7, was intended to afford relief to the public against the decisions under which these great Companies protected themselves by requiring tickets to be signed by persons bringing things to be carried; and that the Legislature, look-

*144] ing to the new mode of conveyance introduced into *the country, and to the monopoly which is in the hands of these Companies, to whom great powers are given; and, considering that the public, bringing things to be carried, must submit to sign the tickets presented to them, determined that these Companies should not have the advantage accruing to them from this extraordinary state of circumstances, and that they should not have the same power which other persons who contract to carry have of making their own bargains and stipulations; but should be subjected to this restraint, that if they impose terms upon their customers those terms must be such as a Court or Judge shall think just and reasonable.

WIGHTMAN, J.—The plaintiff has obtained a verdict for 21*l.*, as the value of a dog which was to be carried by the defendants on their railway, and was lost. It is hardly necessary to inquire whether the loss was occasioned by negligence on the part of the Company or not; because the declaration does not charge that the defendants were guilty of negligence, but that they were liable upon their common law duty as common carriers safely and securely to carry and deliver the dog. If that be so, the case stands thus—a common carrier is only bound to carry goods of that description which his ordinary calling requires him to carry; and dogs are not such a description of goods as at common law carriers might be required to carry. But the Company may have so conducted their business as to agree to carry dogs like any other descriptions of goods, in which case the common law liability of common carriers would attach, unless that is restricted by any *circumstances peculiar to their dealing with

*145] that particular species of property.

The question is, whether in this case circumstances have not arisen to qualify the general liability of the defendants as common carriers. Now, although the Company have made it part of their dealings with the public, when carrying as common carriers, to carry dogs, yet they have always done so upon special terms and conditions; and then the question is, whether the special terms and conditions are such as exempt them from being liable to the extent which this verdict would charge them, viz., the full value of the dog, 21*l.* The contract between the parties upon which the Company rely is this. [His lordship read the first condition of the ticket.(a)] The question is, whether this contract is valid or not. It may be that if the plaintiff had brought his action alleging his dog to be of the value of 5*l.*, he might have recovered in that action. The common law liability would attach unless restricted by this contract. But the other conditions of the ticket are. [His lordship read them.(a)] The Company do not say, "We will not carry any dog unless a declaration of value is made, and there be paid 2½ per cent. upon the declared value, as for insurance;" but they say, "We will be liable only to the extent of 5*l.*" The plaintiff can send his dog to Worthing without a declaration, paying 3*s.*, or whatever the charge for carriage may be, and he may run the risk if it be of greater value than 5*l.* But he pays the smaller sum; and then he is in the position of his own insurer. If he wishes to make the Company responsible to a greater extent than 5*l.* in case

(a) See ante, p. 126.

the dog is lost, he must then under the third condition *(which seems to me for this purpose separable from the first) declare [**146 the value, and pay at the rate of 2½ per cent. Whether that be a reasonable or unreasonable rate he has not the means of ascertaining, nor do I see how the Court can ascertain it, though there may be insurance Companies which insure at a less rate. But it seems to me that there is nothing so unreasonable in this special contract which is contained in the ticket offered to persons bringing a dog to be carried, and which the plaintiff by his agent's signature adopted, as should induce me to consider that the defendants have not a good defence to this action. I think the plaintiff might, if he chose to be his own insurer to any extent beyond 5*l.*, nevertheless have succeeded in an action against the Company to the extent of 5*l.* But since he chooses to charge the company as insurers to the full amount, I think he is bound by this contract, in which there is nothing flagrantly unjust, and the Company are protected on the ground that they are only insurers to the extent of 5*l.*; as he has not chosen to declare the value, and make them insurers to a greater amount by paying the extra charge of 2½ per cent. As the plaintiff sends his dog without making any declaration of value, and does not pay the extra charge, the Company are only liable upon the previous part of their undertaking. I think the one condition is severable from the other. For these reasons, I am of opinion that the verdict for the plaintiff for 21*l.* cannot be sustained; but that it ought to be entered for him for 5*l.*

CROMPTON, J., had gone to chambers.

BLACKBURN, J.—I agree with the Lord Chief Justice *that [**147 the plaintiff is entitled to recover the full amount of the verdict for 21*l.*

This being a case in which we are to draw inferences of fact, I do not think the facts are enough to show that the Company were guilty of any negligence causing the loss of the dog. Nor do I draw the inference that the plaintiff was guilty of negligence conducive to the loss of the dog, which might have been a defence to the action. I infer simply that the dog was casually lost in the course of the journey. Also, I find nothing to lead me to the conclusion as an inference of fact that the dog was lost from fear or restiveness. In my view, it is not necessary to consider whether the conditions are severable or not, because the Court has power to amend the pleadings as it thinks fit.

The question therefore is, whether the Company, having received the dog to be carried under the ticket, are answerable for the loss of it during the journey, arising from a casualty for which neither the plaintiff nor the defendants are blameable. That depends on the construction of the ticket, as regulated and affected by "The Railway and Canal Traffic Act, 1854," 17 & 18 Vict. c. 31. Before the passing of that Act a series of cases, among which were *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 10 C. B. 454 (E. C. L. R. vol. 70), in the Common Pleas, and *Carr v. The Lancashire and Yorkshire Railway Company*, 7 Exch. 707, in the Court of Exchequer, decided that where a railway Company had made a contract contained in a ticket similar to the present, in which it was stipulated

that they should not be answerable for any accident, however caused, the contract bound the parties, and the Company were not answerable *148] for any loss or "injury, even though occasioned by their own negligence. Then the Act of Parliament was passed on which the present question depends. The language of the Act is difficult to construe, but it has received a construction by the Court of Common Pleas in *Simons v. The Great Western Railway Company*, 18 C. B. 805 (E. C. L. R. vol. 86), and by the majority of the Court of Exchequer Chamber in *M'Manus v. The Lancashire and Yorkshire Railway Company*, 4 H. & N. 327, by which we are bound; and I may add that I agree in that construction. The majority of the Court in the latter case say (p. 349) that in consequence of railway and canal Companies having practically obtained a monopoly of carrying, and which the public were obliged to submit to, the object of the Legislature in stat. 17 & 18 Vict. c. 31, was to interpose and require that a Court or a Judge should see that the conditions in the special contract made by railway Companies with their customers were just and reasonable: they say, "It is unreasonable that the Company should stipulate for exemption from liability for the consequence of their own negligence, however gross, or misconduct, however flagrant, and that is what the condition under consideration professes to do. That condition is therefore void, and the case stands simply upon the ground that the plaintiff has employed the defendants to carry his horse safely, and that they have used an insufficient and improper vehicle for that purpose, whereby the horse has been injured." According to that decision, if in the present case the condition which the Company have imposed is unreasonable, that condition being void, the Company have simply contracted to carry the dog safely; and the dog having been lost by no excepted peril, the Company would be liable upon that contract. *Then arise two questions, "What is the construction of the ticket?" and "Is the condition reasonable or unreasonable?"

I cannot think that the statute does not apply to dogs as well as horses. Sect. 7 says, "every such Company as aforesaid shall be liable for the loss of, or for any injury done to, any horses, cattle, or other animals, or to any articles, goods, or 'things.'" Words could hardly be devised more comprehensive to include animals and things usually carried by railway Companies. It is true that the subsequent proviso, awkwardly limiting the amount to be recovered for injury to certain animals, omits "dogs;" and it is argued that we are to read the enactment with that proviso, and then damages would not be recoverable for injury to any animals except those enumerated in the proviso. But I do not think that that proviso restricts the generality of the words in the enactment. I think that we must put a reasonable construction upon the proviso, and read the words "any of such animals beyond the sums hereinafter mentioned," as "such of the animals as hereinafter mentioned beyond the sums following." Then a dog is as much within the statute as a horse. The point, whether a live animal, being a new species of things to be carried, was an article to the carrying of which the common law liability of a carrier attached, which had been thrown out by Parke, B., in *Carr v. The Lancashire and Yorkshire Railway Company*, 7 Exch. 707, arose directly in

M'Manus v. The Lancashire and Yorkshire Railway Company, 2 H. & N. 693, and was noticed in the judgment of the Court (p. 702.) I argued the case as counsel for the plaintiff, and I looked for authorities which might bear upon the point, but found none. It is sufficient to say that the decision of *the Court of Exchequer Chamber was, that the railway Company were responsible for the carriage of a live animal; in that case it was a horse; and that decision bears upon the present case, if the condition is unreasonable.

The condition laid down in the ticket is, that "the Company will not be liable in any case for loss or damage to any horse or other animal above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner or his agent at the time of booking the same, has been given to them, and by such declaration the owner shall be bound." And afterwards it is stated, "If the declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*, the price of conveyance will, in addition to the regular fare, be after the rate of 2*½* per cent., or 6*d.* in the pound, upon the declared value above 40*l.* [or 5*l.*]." I cannot construe these as not being parts of the same condition. And if the Act had not passed, I should have been obliged to construe the ticket as containing this contract between the railway Company and a person bringing a dog above a certain value to be carried, "It shall not be at any risk to the Company, unless the value is declared, for the purpose of regulating the extra charge to be made thereupon." Then, is this extra charge reasonable? I say *this*; because some extra charge may be reasonable. Looking at Simons v. The Great Western Railway Company, 18 C. B. 805 (E. C. L. R. vol. 86), where it was decided that a condition, that the Company were not to be responsible for any loss or damage in the case of goods conveyed at a special or mileage rate, was just and reasonable; and coupling that with MacAndrew v. The Electric Telegraph Company, 17 C. B. 3 (E. C. L. R. vol. 84), and the other cases *referred to in the argument, which supply the key to the decision of the Court in the first-mentioned case, I think that a condition is reasonable and proper which meets the evil of the monopoly possessed by railway Companies, and which gives persons applying to them a bona fide alternative of paying the extra rate of charge, or doing something which is reasonable. But I construe this ticket as saying, that if there is no declaration of value, the Company will not be liable in any case for loss or injury to any animal if the value is more than 5*l.* So that if a man brings such a dog with him to be carried, the Company say, "Either we shall not take your dog to be carried, or you shall pay 2*½* per cent. upon the value by way of insurance, or we will not be liable in any case for loss or injury by the negligence of our servants."

I have had doubts, not whether this condition in itself was reasonable or not, but whether, on the facts here stated, we are put in a position to see that it was not reasonable; for the statute allows such conditions "as shall be adjudged by the Court or Judge" "to be just and reasonable." Are we to adjudge that this condition is just and reasonable, or that it is not just and reasonable, or that we cannot adjudge? But we are to draw inferences of fact, and considering that the charge of 2*½* per cent. is *prima facie* excessive, and that the Com-

pany have all the materials within their own knowledge for showing the condition to be just and reasonable, and that they have not produced that evidence before us, I think that there is enough to justify me as a Judge in drawing the conclusion, which I have no doubt of as a private individual, that this per centage is excessive; and consequently that the condition, which I construe to mean, "We will not *152] **be responsible in any case for any loss or injury unless you pay* this excessive amount," is unreasonable, and is to be rejected. Hence it follows that the Company contracted to carry safely, perhaps excepting the case of loss from fear or restiveness, which is not now in question, and they have not done so; and therefore they are responsible to the owner for the value of the dog.

Judgment for the plaintiff for 21*l.*(a)

(a) The arguments and judgments in this case have been partly compiled from the note book of the late T. F. Ellis, Esq.



IN THE EXCHEQUER CHAMBER.

HARRISON v. THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. Feb. 8.

For head-note, see ante, p. 122.

THE defendants having brought error upon the above judgment, the case was argued in Michaelmas Vacation, November 27th, 1861, before Erle, C. J., Williams, Willes, and Keating, JJ., and Channell and Wilde, BB., by

F. L. Spinks, for the defendants; and
Joseph Brown, for the plaintiff.

The arguments were substantially the same as in the Court below. The only additional case referred to was *Beall v. The South Devon Railway Company*, 5 H. & N. 875, by Channell, B.

Cur. adv. vult.

There being a difference of opinion on the Bench, the following judgments were now delivered.

**ERLE, C. J.*—The declaration was for the loss of a dog *153] delivered to be carried. The pleas are to be amended according to any inference of fact that may be drawn; thus the question is raised whether, upon the facts, the plaintiff proves a right to judgment.

The facts show that the defendants profess to the public to carry dogs, and in that sense are common carriers of dogs; at the same time they profess that their liability in respect of dogs of more value than 5*l.* is limited by this condition, that if the excess of value above 5*l.* be not declared and paid for, the Company will not in any case be liable for loss or damage thereto. The plaintiff delivered to the defendants a dog which he proved to be of the value of 21*l.*; he signed the contract containing the condition above mentioned, and the provision for the payment of 2*½* per cent. on the excess above 5*l.*, as stated in the case, and he neither declared the value nor paid for the excess above 5*l.* The loss of the dog occurred through pure accident,

and was not occasioned by any neglect or default on either side—this being the inference of fact drawn in the Court below and this Court. For that loss the plaintiff had a verdict for 21*l.*, and so the question was raised whether he was entitled to keep a verdict for any sum. The judgment of the Court below was for him; but upon error, I am of opinion that it ought to be reversed and entered for the defendants.

If the case had occurred before "The Railway and Canal Traffic Act, 1854," 17 & 18 Vict. c. 31, the defendants would have been entitled to succeed, being exempt from liability for loss by the terms of their contract. (See *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 10 C. B. 454 (E. C. L. R. vol. 70); [^{*154} *Shaw v. The York and Midland Railway Company*, 13 Q. B. 347 (E. C. L. R. vol. 66); *Austin v. The Manchester, Sheffield and Lincolnshire Railway Company*, 16 Q. B. 600 (E. C. L. R. vol. 71); *Carr v. The Lancashire and Yorkshire Railway Company*, 7 Exch. 707.) Then, is the defence which would have existed before that Act defeated thereby? I think not, on two grounds; 1st, Because the 7th section of that statute has no application to this case; and, 2dly, If the statute has any application thereto, because the condition in the contract of the plaintiff was just and reasonable.

As to the first point, I am of opinion that the 7th section of the statute is confined in its operation to losses and injuries occasioned by misconduct on the part of the railway Company, and not to those occurring through pure accident.

In the construction of this section, I differ from some of my brethren for whose opinion I have a very real respect, but I purposely abstain from expressing deference towards them or regret for myself, being sure that they regard only the interest of truth, and would desire that, if possible, I should make my opinion clear, though opposed to theirs.

The enactment in effect runs thus. Every railway and canal Company shall be liable for the loss of or injury to any horse or thing in the carrying thereof occasioned by the neglect or default of such Company, notwithstanding any condition, &c., made by such Company to the contrary thereof, or limiting such liability; every such condition, &c., being hereby declared void. Then follow the provisos, all of which qualify this enactment, except that relating to contracts in writing, which is a distinct matter.

The section declares that the Company shall be liable ^{*for} [^{*155} the loss of an animal, occasioned by the neglect or default of the Company, and if the loss was not so occasioned, the section has no application. In common parlance, neglect or default would express culpable conduct. If the Legislature intended to provide for all loss, however occasioned, the words "loss occasioned by the neglect or default of the Company," would have no meaning, and no operation.

The history of the section, as contained in all the judgments from *Johnson v. The Midland Railway Company*, 4 Exch. 367, downwards, shows that the Legislature, by the words "loss occasioned by the neglect or default of the Company," meant loss occasioned by culpable conduct, and not a mere failure to deliver occasioned by inevitable accident without any blame. All the Judges have agreed that the Legislature interfered on account of the interpretation put by the Courts on certain conditions imposed by railway Companies on cus-

tomers, in relation to the carriage of live animals, to the effect that the Company would not be liable for any damage, however incurred. Although in each case the Company only sought to apply the condition reasonably, the Courts held that they claimed to be irresponsible "for negligence, however gross, or misconduct, however flagrant" (see *M'Manus v. The Lancashire and Yorkshire Railway Company*, on appeal, 4 H. & N. 327); and these decisions created a panic, lest the Companies should inflict wilful injury and claim immunity. The evil, therefore, to be remedied was irresponsibility for negligence or other culpable conduct created by a condition, and the purpose of the Legislature was to apply a remedy for that evil.

The exemption from liability had been claimed where animals had either been killed or injured. The contest *was whether the Companies ought to be exempt from liability for such damage, if caused by their culpable conduct; and the more minutely the section is examined the more clear does it become that every word of the enactment has a rational effect, if it is construed to take away that exemption and no more. It creates a liability, not for any loss in respect of the non-performance of the duty of carrier, which would include delay, detention, and other similar causes of complaint, but for the loss of or injury to a horse or other thing. The actions which are said to have caused this legislation being actions for injuries to horses. Further, it creates a liability for loss of or injury to a thing, not howsoever caused, but occasioned by the neglect or default of the Company, the contest being whether a Company could exempt themselves from liability for misconduct. Under this construction the statute would only come into operation where, in an action for the loss of or injury to a thing carried, the defence should be a condition exempting from liability. Then if the plaintiff showed that the loss of or injury to the thing was occasioned by the neglect or default of the defendant, the condition would be void unless the proviso which follows the enacting clause applies. By this it is provided that nothing contained in the statute should prevent Companies from making such conditions as a Court or Judge before whom any question relating thereto should be tried, should adjudge to be just and reasonable.

The enactment is that the Companies shall not exempt themselves from liability for losses, &c., by any condition, and that any condition to the contrary shall be null. Then follows the proviso to this effect, viz., unless the Court or Judge before whom the trial is shall think such condition just and reasonable. The meaning is that it should be

*applied in the case above supposed as an answer to the replication either by way of rejoinder or otherwise; alleging that the said condition was just and reasonable. In this sense the statute was understood and applied by the parties and the Court in *Simons v. The Great Western Railway Company*, 18 C. B. 805 (E. C. L. R. vol. 86). So the pleadings are framed, and, on demurrers to the replication and rejoinder, the Court before whom the contract was in question adjudged the fourteenth article to be unreasonable, and the fifteenth to be reasonable. By this construction this proviso has its proper effect of limiting the preceding enactment; and the discretionary power of declaring such a condition, so used, to be just and

reasonable within this proviso, is vested in the Court or Judge presiding at the trial in which it is brought forward, probably because the circumstances to which it is sought to be applied must be either in proof or capable of being put in proof to their satisfaction then. If the party sought to apply the condition unreasonably, as for the purpose of justifying wilful misconduct, the Court or Judge who had all the circumstances before them would be best qualified to adjudge that it was an unreasonable application. On the other hand, if it was sought to be used for exemption from liability for conduct which, though found to be actionable negligence, should appear to them to be culpa levissima, they might hold it to be a reasonable ground for exemption, taking into their account all the terms of the contract, as was done in respect of the 15th article, adjudged to be reasonable in *Simons v. Great Western Railway Company*, 18 C. B. 805 (E. C. L. R. vol. 86).

Contracts by railway companies applicable to all customers must be expressed in wide terms, capable of application to a countless variety of occasions. The Court or *Judge who presides at [*158 the trial in which the condition is sought to be used sees then the application that is contended for, and an adjudication upon an application of the condition to the circumstances of a particular case can only be judged of when that case is ripe for judgment.

In any other sense than this, a power to make contracts which the party cannot by possibility ascertain to be valid till an action has been tried, and the contingency of the test of justice in the mind of the Court or Judge who happens to preside has been ascertained, seems an illusory privilege; and if the Legislature intended that all the conditions of such general contracts as are required for the practical conduct of railways should be construed according to the application which the parties sought to make, rather than according to a perverted meaning which ingenuity might discover, the interest of truth would be promoted.

The provisos that follow, except as above excepted, have also the legitimate effect of qualifying the enactment. By the second proviso the liability for negligence thus created by compulsion is limited to a maximum of value, unless the customer pays a premium for insuring a higher value. By the third the burden of proving the value is thrown on the customer; and by the fifth the rights and liabilities created by the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, are preserved. The fourth proviso, that railway and canal Companies can only bind a customer by a written contract signed does not operate as a proviso, nor cohere with that which precedes nor with that which follows. It stands therefore as a separate enactment.

The section thus construed fulfils the supposed purpose for which it was introduced; it combines with the law *regulating the [*159 rights and liabilities of railways and canal Companies; it may be defective perhaps in omitting any attempt to define the culpable conduct which is included in the terms "neglect or default," but it introduces no anomaly in the law relating to railways, before the decision in *M'Manus v. The Lancashire and Yorkshire Railway Company*, on appeal, 4 H. & N. 827, introduced what I pray leave to call semi-paralyzed contracts, valid for the one party, but contingently

void for the railway Company. That case affirmed that special contracts were within the enacting clause: so far the decision binds, but the question now raised is, not whether special contracts are within the section, but whether it relates to any special contracts except those exempting from liability for misconduct. That point is new, and upon that point I have submitted the reasons why the construction above mentioned should be sanctioned.

I now proceed to show that the construction contended for by the plaintiff ought not to be sanctioned.

The plaintiff contends that the 7th section imposed an incapacity on all railway Companies in respect of all their contracts relating to traffic;—namely, they are to have power to contract and thereby create obligations binding on themselves, but they cannot by any contract create an obligation certainly binding on the opposite party. In other words, any contractor with a railway Company concerning traffic may break his promise with impunity if the Court or Judge who tries thinks it reasonable to allow it.

The Lord Chief Justice, at the end of his judgment in the Court below, thus explains his view of the law.(a) "The Legislature, looking to the new mode of conveyance" (by railway) "introduced into *160] the country, and *to the monopoly which is in the hands of these great Companies, to whom great powers are given, and considering that the public bringing things to be carried must sign the tickets presented them, thought that these Companies should not have the advantage which this extraordinary state of circumstances placed in their hands, and that they should not have the same power which other persons who contract to carry have of making their own bargains and stipulations; but should be subjected to this restraint, that if they impose terms upon their customers those terms must be such as a Court or Judge shall think just and reasonable." To the same effect is the judgment of this Court in *M'Manus v. The Lancashire and Yorkshire Railway Company*, 4 H. & N. 327, 348, 349. "The Company may make special contracts with their customers, provided they are just and reasonable, and signed; and whereas the monopoly created by railways compels the public to employ them in the conveyance of their goods, the Legislature have thought fit to impose the further security that the Courts shall see that the condition or special contract is just and reasonable." To the same effect is *Simons v. The Great Western Railway Company*, 18 C. B. 805, 829 (E. C. L. R. vol. 86), and *Peek v. The North Staffordshire Railway Company*, E. B. & E. 958, 977, 985 (E. C. L. R. vol. 96). I have before observed that the point for decision in *M'Manus v. The Lancashire and Yorkshire Railway Company*, 4 H. & N. 327, 348, 349, was not the point now before the Court. Then does the section enact that all the contracts of railway Companies relating to traffic may be declared void if the Court or Judge at the close of litigation thinks them unreasonable? I am of opinion that it does not. I cannot find any words in *161] the section approximating in the slightest degree to "express such an intention. If there are such words it is for the plaintiff to show them; and if there are none the enactment is not made. But after the judgments that have been given, I am bound to assume that

(a) *Ante*, p. 143.

there are words capable of being construed in the sense contended for by the plaintiff. Then if there are, and the choice is to be made between two constructions of the same words, the reasons in support of each become material. With regard to the defendants' construction, I have before shown that it gives effect to every word, and accords with the purpose of the Legislature in making the enactment, and comes conveniently into practical operation with the general body of our law; and I proceed to the reasons, as I understand them, on which the plaintiff relies to support his construction.

First. It is said that all power of making contracts absolutely binding should be taken away, because railway Companies are supposed to have great capital, and to afford the only means of transit which the public in general choose to adopt; in the language of the judgment above cited "are great Companies, having a monopoly of transit." As to this argument, I before attempted to answer it (see *M'Manus v. The Lancashire and Yorkshire Railroad Company*, on appeal, 4 H. & N. 346). I repeat the attempt here, and I say, 1st. That the Legislature has not referred to monopoly, nor used a word indicating that railway Companies ought to be deprived of any of their rights because they have large capital, and are practically the sole carriers on their lines. Such an enactment, in plain terms, would be revolting in sense and feeling; it is not the less revolting if expressed circuitously. 2d. I submit that the railway Companies have no monopoly, they are subject to external *competition among [162 each other, and the evils arising from that competition, in hindering the traffic of competing lines, led in great measure to the first five sections of this statute; they are also subject to internal competition by rival carriers making them carry and taking from them a part of the profit arising from such carriage. 3d. Even if railways are so convenient to travellers in haste that they require to be controlled, the same reason does not apply to canal navigation where there is neither monopoly nor speed, and yet the seventh section applies to canal Companies as much as to railways. It may be reasonable to prevent exemption from liability for wilful wrong in canal Companies, but it is not reasonable to cripple their power of contracting on account of the supposed prosperity of their rivals, the railways.

Furthermore, if the results of the two constructions are compared, the comparison supports the defendants' case. 1st. The result of the enactment, as construed by the plaintiff, would produce a remarkable anomaly—the whole of the community would be struck with incapacity, as between it and the railway and canal Companies, analogous to the incapacity of infants as between them and the rest of the community. For, as no infant can bind himself, except so far as the contract is for his benefit, so no person can bind himself to a railway or canal Company, except so far as a Court or Judge shall find the contract just. This anomaly is not so prominent where the contract relates to 6d. in the pound for a dog; but take such a contract as that of the Ruabon Company, affecting the price of fuel for millions, set out in *Re Nicholson v. The Great Western Railway Company*, 5 C. B. N. S. 366 (E. C. L. R. vol. 94), whereby the Railway Company contracts to carry to London and *store 200,000 tons of coal [163 annually for ten years, and the Coal Company contracts to pay

during those years at least 40,000*l.* per annum for the carriage. If the Railway Company carries the coals, and sues for the 40,000*l.*, did the Legislature intend that the Coal Company should be able to raise the question whether 40,000*l.* was an unreasonable price; and if the Court or Judge who happens to try the cause thinks so, defeat the claims of the carrier? I submit not. And if the Coal Company sued the Canal Company for not carrying, could the Railway Company prove that the Coal Company intended to dispute the reasonableness of the price, and so break their contract when payment was to be made? I submit not.

Secondly. As to the practicability of testing contracts by reason and justice. According to the defendants' construction, the Court or Judge can be called on to say whether a condition is just only in a certain stage of one class of actions where the case turns on one class of conditions. According to the plaintiff's construction, they may be called on, in respect of all manner of contracts for traffic, to say whether a condition is just. In *M'Manus v. The Lancashire and Yorkshire Railway Company*, on appeal, 4 H. & N. 327, 345, I suggested that the test of the just and reasonable varies with the person who has to apply it; some trust to the common law liability of carriers, some to an intuitive perception, some to the obligation of a promise, and some to their knowledge of the management of railways. It was there suggested that the latter knowledge was beyond the judicial ken; and the judgment in the Court below supports that suggestion.

*164] For the Judges there have applied their faculties and learning *to see whether, if 3*s.* is the fare of a dog worth 5*l.*, it would be just either to charge 3*s. 6d.* for a dog worth 6*l.*, or to charge by the lump for the journey instead of by the mile, and they incline to find injustice in both respects; and they so decide chiefly on the ground that the burden of proof was on the Company. I am not now on the point whether the condition was unjust on these grounds, but on the incompetency of any Court or Judge to say whether such a charge was unjust, and the improbability that the Legislature should intend to impose such a task. The decision indicates that Lord Campbell, who tried this cause, and who had the jurisdiction to say whether the condition was just, ought to have inquired into the risk of injury to a dog forced by a stranger, in spite of alarm, into the dog-box of a train, and held again by a stranger at the end of the journey till the owner takes it; and into the frequency of claims for compensation, in respect of dogs, and so forth; and with respect to charging a lump sum, to have tried whether a charge by the mile would be practicable, —that is, if the charge for the dog's journey was one-ninth of 1*d.* per pound per mile, and that is excessive, and one-eighteenth would be fair, would it be practicable for a clerk to say, with the readiness required for railway tickets, what is the fare for a dog worth 21*l.* going seventy-five miles at one-eighteenth of a 1*d.* per pound per mile? I think that a Court or Judge is incompetent to say what justice requires in respect of such questions; and that the Legislature never intended to put the degradation on them of making them resort to a helpless guess at the dictates of justice in respect of a question which is within the province of fact, not of law.

Thirdly. The inconvenience of fixing the contingency *of validity or invalidity of all contracts relating to carriage on the contingency of the Court or Judge's opinion at the close of litigation I have before adverted to, and I submit it is a further reason against the construction contended for by the plaintiff.

Fourthly. Hitherto I have submitted that it is not probable that the Legislature intended to inflict on railway Companies the evil which the construction contended for has brought upon them. I further submit that it did not intend to inflict the evil resulting therefrom on the community, by reason that the construction leads every contractor with a railway Company to think that the law allows him to break his promise with a railway with impunity, although he may have received the consideration for it, if a Court or Judge should approve.

Throughout the litigation on this liability of railway Companies, the Companies, according to my observation, have acted fairly, the customers quite the reverse. In *Peek v. The North Staffordshire Railway Company*, E. B. & E. 958 (E. C. L. R. vol. 96), the plaintiff used the railway to carry his marbles at a lower rate, and promised to take the risk on himself. In *M'Manus v. The Lancashire and Yorkshire Railway Company*, 2 H. & N. 698, (a) the plaintiff used the railway for his horses, and paid 2d. instead of 4d. per mile, on his promise to take the risk on himself. In this case the plaintiff paid 3s. instead of 11s. for his dog, and promised to take the risk on himself. Yet in all these actions the plaintiffs, who had passed their promise to the railway Company, broke it without scruple, and avowed that they had wrongfully deprived the Company of the premium due to them, and still succeeded in laying a risk on the Companies *which they had promised to bear themselves. I think that the Legislature never intended to teach a large class of contractors to consider whether a Court or Judge would sanction a breach of their contract, —it being of intense importance, legal as well as general, to enforce the notion that contracts bind.

For these reasons I am of opinion that the first point is established, and that the statute does not apply to this case, there being no misconduct; and therefore the contract maintains the defence.

On the second point. If the statute is decided to apply to the action, the question remains, Was the condition just and reasonable? I am of opinion that it was. The section gives the Company a right to a premium, if the customer requires that it should take a risk beyond the value of 5l. The condition is that a customer intending to impose the higher risk on the Company, and withholding the premium which, in honesty as well as law, is due, is to bear the risk. The customer, by making no declaration, wrongfully deprives the Company of that which is the consideration for their liability, and also prevents them from taking what might be greater precaution. Under those circumstances is not the contract reasonable which exonerates the Company from responsibility for any negligence, short of wilful misconduct, towards a customer who has been guilty of grave misconduct towards them? I think that exemption from liability in any case or for any damage, however caused, was never intended to exempt from wilful

(a) S. C. on appeal, 4 H. & N. 327.

wrong, and could not so exempt; and I further think that the defendant had a right to stipulate for exemption from all responsibility except wilful wrong, and that such is the effect of the condition.

*167] *Even if the condition is not just for exemption from responsibility for any negligence, it is severable, and valid pro tanto to exempt when there is no negligence.

If it is contended that the condition is void, because 6d. in the pound is presumed to be exorbitant, and a charge in the lump for the journey unfair, unless evidence to the contrary is adduced, I answer that a contract is to be presumed to be just and reasonable till the party imputing wrong gives some proof that his imputation is well founded; that the contract throws the burden of proof on him who impeaches it, and that the speed in which some customers make their contracts is no reason for presuming that all are treated unfairly.

Furthermore, with respect to the plaintiff's claim to hold the contract void, because the per centage for the excess above 5l. was exorbitant, not only was it never intended to refer such a question to the Judges for the reasons before adduced, but also from the words of the statute itself, making it lawful for the Company to take a reasonable per centage for the excess. By that enactment, the question, whether the per centage is reasonable, is, in my opinion, referred to a jury; and, if the Company demand an unreasonable per centage, the customer may bring the question before a jury according to ordinary custom, either by paying under protest or otherwise, and as the question is so referred to a jury it probably was not intended to be referred to the Judges under the preceding proviso.

For these reasons I am of opinion that the condition must be taken to have been just and reasonable, and that on both grounds the defendants below are entitled to judgment.

*168] *My brother Keating concurs with me that the judgment ought to be reversed on both grounds.

My brothers Williams and Channell think that the judgment ought to be reversed on the second point, viz. that the condition in question was just and reasonable, and give no opinion on the first point.

WILDE, B.—I regret that I cannot agree with the majority of the Court, for I think the decision of the Court below was right.

This is by no means a new subject; it has been discussed in a variety of cases, some of which have found their way by appeal into this Court. The statute regulating railway traffic was intended as a salutary restraint upon the power which the monopoly as carriers has virtually placed in the hands of the railway Companies, and its construction is of daily increasing importance. The number of transactions daily occurring under and regulated by this statute is enormous. It would, therefore, be a great misfortune and a great scandal on the administration of the law if the previous decisions of this Court were departed from. And a worse evil would be, that the practical effect of such decisions should be neutralized by nice distinctions or refined objections.

I, therefore, forbear to argue on the meaning of the statute, or to defend its provisions. The latter office devolves upon the Legislature itself: and the former has been judicially performed once for all by this Court in the case of M'Manus v. The Lancashire and Yorkshire

Railway Company, 4 H. & N. 327. We are, in my opinion, bound by that case until reversed by the Supreme Court of Appeal, and I act upon it the more readily as I entirely *concur with it. I [*169 make these remarks because I am of opinion that that case decides all the chief points raised in argument on the present occasion. The Court there expressed themselves as follows, p. 349 : " Before the statute, every case in which a special limited liability was substituted for the general common law obligation of the carrier, whether by notice acquiesced in, or document signed by the customer, was one of special contract, and the statute is to be construed with reference to that state of the law." And they there declared, p. 348, " That the true construction of the Act and the result of its provisions is this : , viz., that the Company may make special contracts with their customers, provided they are just and reasonable, and signed ; and whereas the monopoly created by railways compels the public to employ them in the conveyance of their goods, the Legislature have thought fit to impose the further security that the Courts shall see that the condition or special contract is just and reasonable." I now apply this decision to the present case.

Under the general common law liability of a carrier, the defendants would no doubt be responsible for the safe delivery of the dog in question. If that liability is restricted or altered, it must be by special contractor condition. Such special contractor condition will be valid if just and reasonable; but if not, it will be void, and the liability unrestricted.

The only true question, therefore, in this case (if the decision in M'Manus v. The Lancashire and Yorkshire Railway Company, 4 H. & N. 327, is freely and fully adhered to), is whether the contract was a just and reasonable one. I agree with the learned counsel for the railway *Company, that the true construction of this contract is, that if the dog should turn out to be worth more than 5*l.*, [*170 the plaintiff can recover nothing. It has been suggested that the condition only means that the plaintiff cannot recover more than 5*l.* But the force of the language used is irresistible, and the construction put by the Company themselves on the condition is clearly correct.

The question then arises, is this condition just and reasonable? This is for the Court or a Judge to decide. Sometimes such a question may depend upon facts not within the knowledge of the Court or a Judge. Some conditions may be manifestly reasonable or unreasonable in themselves; whereas others may be so, or not, only in relation to extrinsic facts, such as the nature and necessary regulation of traffic, the cost of carriage, and the remunerative rates of insurance. In these latter cases, the Legislature, in my opinion, intended that the Court or a Judge should receive evidence of such facts as the basis of their decision. If the condition appeared reasonable on the face of it, it would be for the party impeaching it to adduce evidence of the facts which showed it to be unreasonable. If the condition appeared unreasonable, it would be for the Company to adduce evidence in its vindication. I see no difficulty in applying and working out the provisions of this very beneficial Act in this manner. But whether it is difficult or not, the plain words of the statute cast this duty on the Court or a Judge; and although cases might be put in which such difficulty exists, that does not entitle us to repeal the Act.

of the bills of lading relating to the goods ; whereby and by reason of such negligence, improper conduct and carelessness, an incomplete and inaccurate consular manifest was made out. Special damage was averred. Held by the Court of Queen's Bench, and affirmed by the Exchequer Chamber, that the declaration was bad for not showing that either by express contract or mercantile usage, or from circumstances, there was a duty on the defendant to hand over the copies of the bills of lading to the plaintiffs.

THE declaration stated that the plaintiffs were owners of a certain vessel, called The Panuco, and the defendant was a merchant at Liverpool, trading under the name, style and firm of "A. W. Powles & Son": and by a certain *charter-party, made, to wit, on the 27th [January, A. D. 1859, by and between the plaintiffs and the defendant, it was, amongst other things, agreed that the said vessel should be immediately made ready, and receive and take on board from the defendant a full and complete cargo of lawful merchandise and specie, including gunpowder if any in the river, and thereupon, on being despatched, should proceed to Puerto Cabello ^{and} Curaçoa, and there, or as near thereto as she could safely get, deliver the said cargo in the usual and customary manner agreeably to bills of lading, and so end the voyage. And it was thereby further agreed that the defendant should deliver alongside the cargo to be laden on board the said vessel, and should receive, or cause the same to be received, at her port of discharge in the usual and customary manner, and that he should and would pay for the use and hire of the said vessel, in respect of the said voyage, the lump sum of 190*l.* sterling, in full, and that payment should be made as follows, namely, &c. And it was thereby further agreed, that the defendant should have the option of naming the lumpers and stevedores, who were to take in and stow the cargo, and that the ship should pay the lumpers 8*d.* per ton, and the defendant should pay the stevedore or stevedores for assisting to stow the cargo ; but that the lumpers and stevedores should be under the direction of the master, and that the plaintiffs should be responsible for improper stowage. And it was thereby further agreed that the master should, at the defendant's request, sign bills of lading in the usual and customary manner, and at any rate of freight that might be filled in and made payable, in any manner the defendant might choose, without prejudice to the said charter-party, and that he should attend at the broker's office at least twice *each day [after the loading should commence, for the purpose of signing such bills of lading ; and that the said vessel should be consigned to the defendant's agents at her port of discharge inwards, the plaintiffs being free of commission ; and that the cargo should be taken from alongside at the defendant's risk and expense. The declaration then proceeded to allege, that after the making of the said charter-party, and before, &c., the defendant put up the said vessel as a general ship ; and that a large quantity of goods were shipped by the defendant at Liverpool, on board the said ship Panuco, for the voyage mentioned in the said charter-party, and eight bills of lading were duly made out by the shippers of the said goods, and signed by the captain in respect of and relating to the said goods ; that it was and is usual and customary at Liverpool for the shippers of goods by vessels to make out for the captain a correct copy of each bill of lading in respect of such goods, and that the shippers of the cargo, by the said vessel

Panuco, did make out copies of the said eight bills of lading for the captain of the said vessel, and did deliver the said copies to the defendant for the captain ; that the defendant kept and retained in his own possession and control the entire set of the captain's copies of the eight bills of lading, and that the plaintiffs had no copies of the said bills of lading within their possession or control, nor was it in their power to obtain the said bills of lading, or copies thereof, except from the defendant; that it became and was necessary, as the defendant then well knew, for the purposes of the voyage and to secure the goods shipped, or any part of them, from being seized or confiscated abroad by the proper authorities in that behalf, and to enable the plaintiffs to deliver the goods to the consignees thereof abroad, that before the ship sailed with the goods from Liverpool on the voyage, a certain document, known in the trade as and called "A Consular Manifest," should be made out at Liverpool, in which (amongst other things) an accurate account and description of the goods shipped and included in the eight bills of lading should be given; that it was necessary, as the defendant then well knew, for the purpose of making out a complete and accurate consular manifest that the person employed to make out the same should, at the time of its being so made out, have all the bills of lading for and relating to the said goods, or copies thereof; that it was the duty of the defendant (a) as such charterer, and under such charter-party as aforesaid, and having in his possession the captain's copies of the bills of lading in respect of the goods shipped on board the vessel chartered as aforesaid, upon being requested so to do by or on behalf of the owners of the vessel, and as incident to such charter-party and the circumstances as aforesaid, to hand over and give all such captain's copies, or the copies thereof, for the purpose of enabling a complete and accurate consular manifest in respect of the goods mentioned in the bill of lading to be made out; that the defendant was required by and on behalf of the plaintiffs to hand over the captain's copies of the bills of lading, or copies thereof *to one Kellick, who was then the agent employed by the plaintiffs at Liverpool, to make out such consular manifest in respect of the goods shipped upon The Panuco: But the defendant, well knowing the premises, and before the said ship sailed from Liverpool on the voyage mentioned in the said charter-party, negligently, improperly and carelessly only handed over to the said Kellick, then being the agent employed at Liverpool to make out such consular manifest in respect of the goods shipped on board The Panuco, copies of six out of the eight bills of lading as and for the whole of the bills of lading applicable or relating to the goods, and no other bills of lading or copies of bills of lading whatsoever; whereby, and by reason of such negligence, improper conduct and carelessness, the said Kellick was led to believe that the said copies of the bills of lading so handed to him were copies of all the bills of lading applicable and relating to the said cargo, and was induced to make out an incomplete and inaccurate consular manifest, and had no

(a) Originally this was alleged as a mercantile custom at the port of Liverpool; but on the trial of the issues of fact before Martin, B., at the Summer Assizes at Liverpool, in 1860, there not being sufficient evidence of the custom, the learned Judge gave leave to amend the declaration by alleging it to be a duty. A verdict was given for the plaintiffs, damages £70*l.* 10*s.* 8*d.*

means of making out a complete and accurate consular manifest in respect of the goods shipped on board The Panuco, and whereby in fact an incomplete and inaccurate consular manifest in respect of the goods was made out, containing only an account and description of part of the goods mentioned in the six bills of lading, of which copies were furnished by the defendant, and not containing an account or description of a certain number of bales or packages then shipped on board the said vessel, to wit, fourteen bales or packages, not mentioned in the six bills of lading, but mentioned in the two other bills of lading of which the defendant did not furnish the originals or *179] copies to the said Kellick. The declaration then averred that, after the making out of such consular manifest, the vessel sailed on the voyage with the goods on board, and arrived at Puerto Cabello, in South America; and there, by reason of the said negligence, improper conduct and carelessness of the defendant in that behalf, and of the consular manifest being imperfect, inaccurate and incomplete, certain bales and packages, to wit, the said fourteen bales not mentioned or entered in the manifest, were seized and confiscated by the proper custom house authorities at that place, according to the custom house laws of that place then in force, on account of their not being specified or entered in the manifest, and the plaintiffs were unable to obtain a redelivery to them of the goods so seized and confiscated; and by reason of the premises, the plaintiffs' vessel was detained a long time by legal authority abroad, and the plaintiffs were put to great expenses in respect to the detention of the vessel at Puerto Cabello, and in respect of the payments to and keep of the master and crew of the vessel during such detention, and became liable to, and were obliged to pay there, double duties in respect of and upon the goods so seized and confiscated, amounting altogether to a large sum, to wit, 200*l.*; and whereby also, when the ship afterwards proceeded from Puerto Cabello on her voyage in the charter-party mentioned, and arrived at Curaçoa, the plaintiffs were unable to deliver there the goods, to wit, the fourteen bales or packages to the consignees thereof at that place, though required so to do, and were forced and obliged to pay to the consignees the value of the goods, amounting to a large sum, to wit, 473*l.* 15*s.* 10*d.*, and incurred *180] other divers expenses, amounting, to wit, *to 700*l.* in respect of the same, and in respect of the detention of the vessel at Curaçoa, and in respect of payments to and the keep of the master and crew of the said vessel during such detention and otherwise.

The defendant pleaded not guilty, and other pleas traversing some of the averments in the declaration; upon which the plaintiffs took issue.

There was also a demurrer to the declaration, and joinder therein.

The demurrer was argued in Hilary Term, 1861, January 22d and 25th.

Mellish (with him Edward James), for the defendant.—Actions for carelessness, except where direct damage has accrued, are founded on breach of duty. But in this case the alleged duty in the defendant is not imposed by any clauses in the charter-party, nor does it arise from any facts stated in the declaration. The real cause of action is the handing copies of six bills of lading as and for eight which had

been delivered to the defendant, that is, representing that the six were the eight ; but a careless representation without fraud or warranty is not a cause of action. In *Boorman v. Brown*, 3 Q. B. 511 (E. C. L. R. vol. 43),^(a) the question was, whether there was a duty in the defendant, as the broker employed by the plaintiffs to sell oil, not to deliver it without the price being paid to him according to the contract which he had made for the plaintiffs with the purchaser ; and the Court of Exchequer Chamber, reversing the judgment of this Court, held that the duty arose by necessary inference from the terms of the contract between the plaintiffs and the defendant, as set forth in the declaration ; and the judgment of the Exchequer [*181 Chamber was affirmed in the House of Lords. [CROMPTON, J.—In that case there was direct privity between the plaintiffs and the defendant.] In this case no contract, undertaking, or retainer imposing the alleged duty is alleged in the declaration. There is no right of action in the plaintiffs on the ground of bailment, for the delivery of the documents to the defendant was by the shippers, not by the plaintiffs.

Milward (with him *H. T. Holland*), contrâ.—This was not an ordinary charter-party, by which a ship is chartered by a merchant to put his goods on board, but an agreement that the charterers might put up the ship as a general ship. In such a case the goods are loaded for the benefit of the charterer ; and he deals with the actual shippers of the goods, who pay him, and he pays the shipowner a lump sum for the voyage : in short it is like a demise of the ship. There is privity between the plaintiffs and the defendant : he is interested, together with the plaintiffs, in the performance of the voyage. *Schuster v. McKellar*, 7 E. & B. 704 (E. C. L. R. vol. 90), shows the position which the captain of a ship under such circumstances occupies in relation to the goods : the last placitum in the marginal note is, "Sembâ : that under such a charter-party the shipowner, though perhaps not liable on the contracts made for carriage of goods in the ship as a general ship, is still liable for the misdelivery of the goods by the captain, who for many purposes remains his servant. Sed quære." The plaintiffs, as shipowners, were bound to deliver the goods to the consignees at the foreign *port, according to the documents ; and the consular manifest was essential to enable the plaintiffs [*182 to perform their contract. Also the consular manifest should describe all the goods on board, as any such not described are liable to confiscation ; and it is part of the duty of the charterer to furnish the materials from which the consular manifest is to be made out.

First. Suppose the allegation of duty were not in the declaration, the alleged duty would arise from the facts stated in it. It is averred that the shippers of the cargo made out copies of the eight bills of lading "for the captain," and delivered them to the defendant "for the said captain," which means that they were to be handed to the shipowner. [CROMPTON, J.—It means that they delivered them to the defendant for the ship. HILL, J.—The shippers should have given them to the captain.] They had nothing to do with the captain : it is stipulated that he should attend at the broker's office, that is, the broker of the defendant, twice each day, for the purpose of signing

(a) In Exch. Ch. 3 Q. B. 516 (E. C. L. R. vol. 43), in H. L., 11 CL & F. 1.

the bills of lading. Then it is averred that the plaintiffs could not obtain copies of the bills of lading except from the defendant, which shows that the defendant was the only person who could enable the plaintiffs to perform their contract with the owners of the goods. [HILL, J.—The custom in Liverpool for the shippers of goods to make out a correct copy of each bill of lading did not impose any duty as between the plaintiffs and the defendant.] The plaintiffs would have no communication with the shippers, nor any right to interfere with them as to the goods put on board. The captain had no right to insist *183] on the shippers giving him bills of lading; *and it was immaterial to the shipowner what goods were put on board, because he was to receive a lump sum under the charter. The duty alleged is incidental to the relation of the parties; and the defendant is answerable for not supplying the necessary information, even though he neglected to do so from ignorance. In *Brass v. Maitland*, 6 E. & B. 470 (E. C. L. R. vol. 88), the act of delivering the goods on board raised a duty on the part of the shippers not to deliver packages of a dangerous nature without giving notice. [CROMPTON, J.—In that case the undertaking necessarily arose from the contract.] Even if there was no duty, but the defendant was asked to do a thing, and he did it unfaithfully, that would be a cause of action; and, to show this, circumstances debars the contract may be annexed to it: *Humfrey v. Dale*, 7 E. & B. 266.(a) “The only difference between an express and implied contract is in the mode of substantiating it:” *Mazzetti v. Williams*, 1 B. & Ad. 415, 423 (E. C. L. R. vol. 20), per Lord Tenterden. The plaintiff is not bound in his declaration to say how he means to prove his cause of action. [HILL, J., referred to *Parnaby v. The Lancaster Canal Company*, in error, 11 A. & E. 223 (E. C. L. R. vol. 39).] In *Boorman v. Brown*, in the House of Lords, 11 Cl. & F. 1, 44, Lord Campbell said, “Wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment the plaintiff may either recover in tort or in contract.”

*184] Secondly, it is the proper course of pleading to add *an allegation of duty; *Burnett v. Lynch*, 5 B. & C. 589, 609 (E. C. L. R. vol. 11); and it may be a substantive allegation, and not merely a result from the facts stated. In *Burnett v. Lynch*, 5 B. & C. 589, 609 (E. C. L. R. vol. 11), Littledale, J., said, “Where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although *assumpsit* may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach.” [CROMPTON, J.—A positive duty to hand over all the copies of the bills of lading is alleged: suppose one of them was lost or burnt.] It may be that the burden of proof is on the shipowner to show that they are in the possession of the charterer; but here that fact must be taken as found, it being alleged that the defendant kept the entire

(a) Affirmed on error, E. B. & E. 1004 (E. C. L. R. vol. 96). .

set of the captain's copies of the bills of lading. Here is not merely a wrongful act of omission, but a wrongful act of commission, by handing over the six bills of lading, and in effect saying that there were no more. In *Com. Dig. Action upon the Case* (A.), it is said, "In all cases, where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." In *Burnett v. Lynch*, 5 B. & C. 589, 609 (E. C. L. R. vol. 11), which was an action in tort by the executors of a lessee against his assignee for neglecting to perform the covenants in the lease, whereby they sustained damage, Littledale, J., said, "The very ground of the *action would be that the plaintiffs were damaged by reason of their having to perform that which the assignee ought to have performed." [HILL, J.—When goods are loaded on board, the captain should give a receipt, and when he signs the bill of lading he gets back the receipt. He then has a full particular of all the goods on board. Why was not that ordinary care and caution exercised by the captain in this case?] The receipts would not contain the name of the consignee. Moreover, the plaintiffs would have to prove that the damage arose from the negligence of the defendant, and not from the default or neglect of the captain.

Mellish was not called upon to reply.

CROMPTON, J.—The only doubt in my mind has been whether the allegation of duty in the declaration was sufficient. But the authorities are strong to show that such an allegation is merely a conclusion of law resulting from the facts stated; and I think this allegation of duty is so laid. Then, if the duty does arise from the facts, the allegation can do no harm, and it sometimes puts the legal view more neatly; on the other hand if the duty does not arise, the allegation can do no good. The allegation here is, "that it was the duty of the defendant, as such charterer, and under such charter-party as aforesaid, and having in his possession the captain's copies of the bills of lading in respect of the goods shipped on board the vessel chartered as aforesaid, upon being requested so to do by or on behalf of the owners of the vessel, and as incident to such charter-party and the circumstances as aforesaid, to hand over and give all such captain's copies, *or the copies thereof, for the purpose of enabling a complete and accurate consular manifest, in respect of the goods mentioned in the bill of lading, to be made out." That refers to all the preceding matter, and appears to me to be an allegation of duty to be implied by law from the circumstances. It is an allegation of law, not of fact; and such an allegation ought to be construed most strongly against the party pleading it, because the opposite party cannot traverse it.

But we must now see whether the declaration shows a cause of action supposing this allegation struck out. Does it raise a duty on the part of the defendant to hand over the documents in question? The declaration appears, until amended, to have gone out in a good shape, stating a custom of merchants at Liverpool that such a duty should be performed; in other words, stating an engagement to that effect; for, as Mr. Milward properly said, it does not signify how the duty arose. But that statement of the custom has been struck out, and the allegation of duty inserted. I cannot see anything, either in the

charter-party or the averment of circumstances in the declaration, to show that such a duty as this was cast upon the defendant. The declaration states that it is usual and customary at Liverpool for the shippers to make out copies of the bills of lading for the captain; but it is not laid in the declaration that it is the duty of the charterer to make out copies for the plaintiffs. I think usually the shippers come to the captain, and he takes copies from them: he should take care to have the proper documents; and if he had done so in this instance, he would have had materials for making out the consular manifest.

*187] "It is alleged that the defendant knew it was necessary that the plaintiffs should have a consular manifest, which could not be made out without copies of the bills of lading, and that they could only get copies from the defendant; that the defendant did not hand these copies over to the captain; and that the consequence was, that some of the goods were confiscated and lost to the plaintiffs. I cannot, from those allegations, draw any inference of such a contract in law on the part of the defendant, that, under such circumstances, he would hand over the copies. Whether such a contract might be implied under such circumstances, if there was evidence leading to it, is another question. And there does not appear to be any mercantile usage, because the allegation of such a usage was struck out.

Then the question is, whether this is a case of bailment. If there had been any communication between the plaintiffs and the defendant upon the subject, or if there was any privity between them, so that the defendant received these documents for the plaintiffs, there might be a duty on the defendant to hand them over to the plaintiffs. But, as the case stands, the copies were handed over by the shippers, and the captain did not take them, as he ought to have done, at the time of signing the bills of lading; and it is only alleged that the defendant was required by the plaintiffs to hand over the copies to Kellick, their agent at Liverpool. Therefore, as Mr. Mellish says, the shippers are the bailors, and there is nothing in this part of the charter-party to show any agreement with the plaintiffs that the defendant would hold these documents for them, nor is it averred that the defendant

*188] received them as their agent. On this declaration, it must be taken that the documents remained in the hands of the shippers, who, it must always be remembered, are the parties entitled to the custody of them; and therefore, if there was a duty on any one, I should say it was their duty, and not the duty of the charterer, to make out and deliver copies for the captain. If a person sends his servant to deliver a parcel of documents or chattels to a third person, and the servant is careless about them, the bailment is from the person who sent the documents or chattels, and therefore the responsibility is to him, and not to the party to whom they were to be delivered.

Mr. Milward also put the case as an act of commission, that the defendant delivered six copies of the bills of lading, "as and for the whole of the bills of lading applicable or relating to the goods." Mr. Mellish properly answered that by saying that it would be a misrepresentation, for which the defendant would not be liable unless he made it fraudulently or deceitfully; and this argument is in accordance with *Gerhard v. Bates*, 2 E. & B. 476 (E. C. L. R. vol. 77), and other cases. The defendant was not under any duty to get the docu-

ments, or to deliver them all; he took on himself to do this for the shippers; and having made a careless misrepresentation, without any intention to mislead, he is only liable to his bailor for that carelessness.

HILL, J. (the only other Judge present.)—I am of the same opinion. The action is brought for the non-performance of a duty stated on the face of the declaration; but I think there are no facts or [*189] "circumstances stated to raise that duty, nor any express contract shown to support an allegation of duty. The express contract, when examined in all its particulars, does not refer to it; and there is no mercantile usage averred to impose or create it. The mercantile usage, which was alleged in the declaration as imposing the duty, was traversed, and at the trial the plaintiffs failed to prove it; whereupon they amended their declaration, and struck out that allegation. We cannot therefore assume indirectly that which the plaintiffs had alleged directly and failed to prove. Then, independently of the express contract, do the circumstances impose the duty? I think, looking at the averments in the declaration, that they do not include, but exclude it. The declaration avers that "it was and is usual and customary at Liverpool for the shippers of goods by vessels to make out for the captain a correct copy of each bill of lading in respect of such goods;" that casts a duty upon the shippers to make out for the captain copies of the bills of lading. It then goes on to allege the fact of the employment by the shippers of the defendant to deliver over the copies to the captain; but it does not say that the plaintiffs employed him as their agent, or that the defendant and the plaintiffs had any communication upon the subject, or that there was any undertaking by the defendant to deliver over these copies; it only alleges negligence by the defendant in performing a duty imposed on him by what the shippers requested him to do; and they now seek to make that a duty on the part of the defendant towards the plaintiffs, which it clearly was not in law. Therefore I think that the plaintiffs fail to make out the cause of action which they allege in the declaration.

*And I think that none of the cases cited apply. In Boorman v. Brown, 3 Q. B. 511, 516 (E. C. L. R. vol. 43), 11 Cl. & F. [190] 1, there was an express employment, and a contract by the defendant to do that for the non-performance of which he was held liable in an action. In Burnett v. Lynch, 5 B. & Cr. 589 (E. C. L. R. vol. 11), there was express privity between the plaintiffs and the defendant, the plaintiffs having assigned to the defendant subject to the performance of the covenants contained in the lease; and the defendant, having accepted the assignment subject to that performance, undertook, as towards the plaintiffs, that he would perform the covenants. The authorities therefore fail in establishing that which the plaintiffs contend for; and I am of opinion that the defendant is entitled to our judgment. Judgment for the defendant.(a)

(a) The arguments and judgments in this case have been partly compiled from the note book of the late T. F. Ellis, Esq.

*195] patent were not letters patent for the sole working or making of any manner of manufacture within this realm, according to the true intent of the statutes in that behalf.

Upon these pleas issue was joined.

On the trial, before Cockburn, C. J., at the Sittings at Westminster after Michaelmas Term, 1859, the following facts and circumstances were proved or admitted.

By letters patent, dated the 16th March, 1853, the sole privilege was granted to C. H. Wild, his executors, administrators and assigns, of making, using, exercising and vending within the United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, an invention for "improvements in fishes and fish-joints for connecting the rails of railways," for the term of fourteen years from the 16th March, 1853, upon the usual conditions.

A provisional specification was left by Wild, at the office of the Commissioners of Patents, with his petition, on the 16th March, 1853, by which, among other things, he declared the nature of his invention to be as follows:—"In securing the joints of rails it has been found advantageous to attach pieces of iron to side of the rail by means of bolts and nuts, and each such pieces of iron are commonly called 'fishes.' Chairs have been constructed on a similar principle to support one side of the rail, while a fish is applied at the other side, and secured to the chair by bolts and nuts. My invention consists in forming a recess or groove in one or both sides of each fish, so as to reduce the quantity of metal at that part, and to be adapted to receive the square heads of the bolts, which are thus prevented from turning round when the nuts are being screwed on."

*196] The specification in pursuance of the condition of the *letters patent was filed by Wild, in the Great Seal Patent Office, on the 16th September, 1853, by which he declared "the nature of the said invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement thereof, reference being had to the accompanying drawings and to the figures and letters marked therein." The fishes and bolts in figure 1 were described in the following paragraphs:—

"(1.) The fishes, F F, are made with a groove or recess in their outer surfaces, which groove serves to receive the square heads of the bolts, G H, and prevent them from turning round when the nuts are being screwed on or off. Washers, K L, are placed in the groove of the fish which is next to the nuts, so as to allow of the nuts being turned round; or the fish on this side may be made without the groove. The position of the bolts and nuts may be reversed if preferred, so that the nut may be prevented from turning round while the bolt is screwed into it. The groove renders the fish lighter for equal strength, or stronger for an equal weight of metal than a fish which is made of equal thickness throughout." "The top and bottom of each fish is a plain surface, and the parts of the rail with which they come in contact are also plain surfaces, forming the same angle as the top and bottom surfaces of the fish. The fishes are thus made to fit into their places with greater facility than if these surfaces were of curved or irregular forms. If, however, the surfaces of the rails are curved, the fishes may be made to fit them."

"(2.) The central bolts, G G, are made of larger diameter than the extreme ones H H, as the strain is *greatest upon the central bolts. Rivets may be employed in lieu of bolts and nuts if [*197 preferred. When three bolts and nuts or rivets are employed, I make the central one of larger diameter than the other two. When rivets are employed, the groove in the fish enables me to employ rivets whose heads are thicker, with the same amount of projection from the side of the rail, or which project less, with the same thickness of head, than when plain ungrooved fishes are employed. This is a matter of great advantage, as avoiding the danger of the flanges of the wheels of the carriages coming into collision with the rivets. I manufacture the grooved fishes of wrought iron, by rolling it between rollers of corresponding forms, in a similar manner to that in which railway bars and other wrought iron bars are manufactured. The bars are then cut to the required length."

The claim was as follows:—"Firstly, the constructing fishes for connecting the rails of railways, with a groove adapted for receiving the heads of the bolts or rivets employed for securing such fishes, and the application of such fishes for connecting the rails of railways, in manner hereinbefore described. Secondly, the constructing fish-joints for connecting the rails of railways by means of fishes applied to the joints of divided or split rails in manner hereinbefore described. Thirdly, the constructing fish-joints for connecting the rails of railways with fishes, secured by three or more bolts and nuts or rivets, of which the central bolt or bolts, or rivet or rivets, is or are of greater diameter than the extreme ones, as hereinbefore described. Fourthly, the constructing fish-joints for connecting the rails of railways with grooved fishes fitted to the sides of the rails, and secured to them by bolts, or nuts, or *rivets, and having projecting [*198 wings firmly secured to and resting upon the sleepers or bearers, so as to support the rails by their sides and upper flanges, in manner hereinbefore described. Fifthly, the constructing fish-joints for connecting the rails of railways with rails and fishes, having the touching surfaces of one or both of them planed as hereinbefore described."

A model was produced showing two rails of a railway connected by fish-joints according to the patent.

It was admitted by the defendants that if the patent of Wild could be sustained the invention patented was useful, and that they had infringed the patent.

It was proved that before the date of the letters patent the rails of railways had been commonly and publicly connected by fishes and fish-joints, pieces of iron being attached to each side of the rail at the joints by means of bolts and nuts, as mentioned by Wild at the commencement of his provisional specification. In some cases flat fishes had been used, which were placed one on each side of the rail, and were attached by means of round bolts passing through round holes in the fishes, and having round or cup-shaped heads and nuts. When this mode of construction was adopted, it was necessary that the heads of the bolts should be held by a spanner, or some other separate instrument, while the nuts were being screwed on and off. In other cases the fishes were flat, but the holes in one of the pair of

fishes were square, instead of being round, and the bolts were made with square necks under the head, so as to fit the square holes. And in other cases one of the pair of fishes was cast with square recesses, sunk about a quarter of an inch below the surface, and the bolts were made with square heads, so as to fit into these recesses.

*199] Models showing two rails of a railway connected by *fishes and fish-joints of the three descriptions above mentioned were produced.

The object of having the bolts with square necks fitting into square holes, as shown in one of these models, and in having the bolts with square heads fitting into recesses, as shown in another of them, was to prevent the bolts from turning round when the nuts were being screwed on or off, and this object was effectually accomplished by each of these contrivances. But until the time of the patent of C. H. Wild, fishes for connecting the rails of railways had never been made with a groove or recess in their outer or lateral surfaces, so as to receive the square heads of the bolts, and at the same time to render the fish lighter for equal strength, or stronger for an equal weight of metal than a fish made of equal thickness throughout.

It was also proved that, before the date of the letters patent, in the construction of several timber bridges of and over one or two lines of railway, constructed under the superintendence of the late Mr. Brunel, beams of timber had been laid horizontally one above the other, and fastened or bolted together with bolts and nuts; that horizontal bars or plates of iron were placed beneath, and parallel to, and in contact with, the horizontal beams, and were also fastened or bolted by the same bolts and nuts; and that each of these bars or plates of iron was constructed with a groove in its under surface, which received the square or hexagonal heads of the bolts, as shown on the models. It further appeared that this mode of construction was adopted in order to effect, and did effect, the double purpose of *200] strength and of preventing the heads of these bolts from turning round. But in these bridges there were *not joints to be fished by the bars or plates of iron, nor were there corresponding bars or plates of iron above the horizontal beams; there was therefore no fishing in the proper sense of the word.

Upon this evidence relating to the bridges, the defendants contended that the use of grooved iron, as above mentioned, for the double purpose of giving increased strength and of preventing the heads of the bolts from turning round, having existed publicly prior to the date of the letters patent, the invention of C. H. Wild being only an application of the same contrivance to fishing iron rails of railways, was not the subject of a patent.

The Lord Chief Justice ruled that, notwithstanding this evidence, the invention might be the subject of a patent; but he reserved leave to the defendants to move to enter the verdict for them, if the Court should be of a different opinion.

The defendants further proved that in the year 1847 a certain timber bridge, known as the "Hackney Bridge," had been constructed by the late Isambard Kingdom Brunel, for carrying the South Devon Railway over the Teign Canal. The span of this bridge was too great to be conveniently crossed by any single beam, and the bridge

was constructed so as to have upon each side two horizontal longitudinal beams of timber, the ends of which met and were joined together, in the middle of the bridge, by scarf-joints. Beneath these beams were placed transverse planks, which extended from side to side of the bridge and constituted the flooring or roadway of the bridge, and immediately beneath the transverse planks were longitudinal bars of grooved iron, one upon each side of the bridge, running parallel to and under the longitudinal beams along the whole length of *the bridge, with the grooves or channels [*201 downward. Bolts with square heads, as shown by the models, passed through the grooved iron bars, transverse planking and the longitudinal beams, that is to say, from the lower to the upper side of the bridge, the square heads of the bolts resting in the grooves of the iron bars, and being prevented, or intended to be prevented, from, turning round within the grooves; and the nuts were screwed on to the upper ends of the bolts, as shown by the model. The grooved iron was carried under each of the scarf-joints, in the same manner as under the other portions of the beams; and above and immediately over each scarf-joint, extending for a distance of about 18 inches beyond each end of the joint, and resting immediately upon the longitudinal beam, was a horizontal flat plate of iron 13 feet in length, through which the bolts above described also passed at that portion of the bridge.

The bars of iron along the under side of the bridge were so constructed and used with a groove, for the double purpose of receiving the square heads of the bolts and preventing them from turning round, and of rendering the bars of iron lighter for equal strength, or stronger for equal weight of metal, and the bars, as so constructed, effectually accomplished this double purpose.

Models were produced, which showed the modes of the construction adopted in this bridge.

In answer to questions put to them by the Lord Chief Justice, the jury found :

First, that the channelled irons upon the railway bridges, independently of the single instance of the Hackney Bridge, were used before Wild's patent for the double *purpose of obtaining increased strength and preventing the bolt-heads from turning round, but that they were not used for the purpose of fishing. [*202

Secondly, that the fastening of the scarf-joint of the longitudinal beam at the Hackney Bridge was a fishing of that joint, but that the use of the channelled iron as one of the plates of the fish arose from its being already there for the purpose of fastening the beams and the iron together, and was not adopted by Mr. Brunel with reference to or in contemplation of the special advantages in fishing contemplated by Wild's patent.(a)

Upon that finding, the Lord Chief Justice directed a verdict to be entered for the plaintiffs. In Hilary Term, 1861,

Bovill obtained a rule to enter a verdict for the defendants in pursuance of the leave reserved, on the ground of the invention not being

(a) On the argument of the case in the Exchequer Chamber, the case on which the appeal was heard was amended by consent, this clause being substituted for another by the Lord Chief Justice from his notes.

the subject of a patent, by reason of the previous use of grooved iron in the timber bridges (other than the Hackney Bridge), for the double purpose of obtaining increased strength for the same weight of metal, and of preventing the bolt-heads from turning round; or for a new trial, on the ground of misdirection with respect to the application and use of the grooved iron in the Hackney Bridge.

Knowles showed cause (*Grove, Hindmarch and T. Webster*, who were with him, were not called upon).—First, Wild's improvements in fishes and fish-joints for connecting the rails of railways are the subject of a [203] patent. His invention *consists in forming a recess or groove upon one or both sides of each fish, by means of which the quantity of metal is reduced without impairing strength, and at the same time the square ends of the bolts are prevented from turning round. By this invention, vibration at the junction of the rails is prevented, a perfect and complete joint is produced, and the weight of metal is economized. In *Brook v. Aston*, 8 E. & B. 478 (E. C. L. R. vol. 92), (a) there were two patents—one for dressing cotton and linen yarns, and the other for dressing yarns of wool or hair; but the machine was identical in both cases. Lord Campbell said, p. 485, "It may well be that a patent may be valid for the application of an old invention to a new purpose; but, to make it valid, there must be some novelty in the application." Before Wild's patent, the fish had never been applied to joining the ends of rails, nor to any analogous or cognate purpose. The use of plates of iron for connecting the transverse and longitudinal beams in bridges is for sustaining the weight of the bridge and keeping the beams in their proper places, which is not a purpose cognate to that for which the grooved fish on railways is used. In *Boulton v. Bull*, 2 H. Bl. 463, (b) Watt's patent for condensing steam in steam engines, whereby the consumption of steam and fuel was lessened, was held good, although the process of condensing had been long known and practised in the common still. [He also cited *Cook v. Pearce*, 8 Q. B. 1044 (E. C. L. R. vol. 55), *Derosne v. Fairie*, 2 C. M. & R. 476, 1 Webst. Pat. Ca. 154, and *Newton v. Vaucher*, 6 Exch. 859.

*Secondly, there was no misdirection. There was no invention in the use of the channelled iron at the Hackney Bridge, as the advantage of it was not known to Mr. Brunel, and the fishing of the joint which took place there was accidental: also there was no publication of its use; and though it was at a place open to public view, it did not appear that it was known to any one, nor likely to be observed by any one. A single publication is indeed sufficient to avoid a patent, as in the case of a lock put on a gate adjoining a public road: *Carpenter v. Smith*, 9 M. & W. 300, 1 Webst. Pat. Ca. 530. But in that case several dozens of a similar lock had been made at Birmingham, and sent abroad, and the lock had been for sixteen years on a gate adjoining a public road, and any one who looked at it could see what the mechanism was. [HILL, J.—In *Carpenter v. Smith*, if the patent had been held good, the man who made the locks at Birmingham would have been prohibited from using them; but in this

(a) Affirmed on appeal, 5 Jur. N. S. 1025.

(b) S. C. in error, nom. *Hornblower v. Boulton*, 8 T. R. 95.

case, if the patent is good, can the plaintiffs prevent the application of it to fishing the scarf-joint in a bridge?]

Bovill, C. E. Pollock, and Horace Lloyd, in support of the rule.—First, the defendants are entitled to have the verdict entered for them upon the finding of the jury. The use of grooved or channelled plates of iron in various forms was a common mechanical expedient for the double purpose of obtaining increased strength with the same weight of metal, and of preventing the bolt-heads or nuts turning round; and grooved or channelled plates of iron, such as those in Wild's patent, had been used in several timber bridges on lines of railway. The plaintiff's specification only transfers to a new subject-matter, viz., "the fishes and fish-joints of railways, a known mechanical contrivance; as was done in the case of the anchor in Brunton *v.* Hawkes, 4 B. & A. 541 (E. C. L. R. vol. 6). [They cited passages in the judgments of Abbott, C. J., p. 550; Bayley, J., p. 554, and Best, J., p. 557.] The fresh use of a known principle, with no variety in the mode of applying it, is not the subject-matter of a patent: Losh *v.* Hague, 1 Webst. Pat. Ca. 202, 206, 207, per Lord Abinger; Carpenter *v.* Smith, 1 Webst. Pat. Ca. 530, 534, 9 M. & W. 800, per Lord Abinger; The Queen *v.* Cutler, 3 C. & K. 215, 228, Macr. Pat. Ca. 124, 133, 134, per Lord Denman; Brook *v.* Aston, 8 E. & B. 478 (E. C. L. R. vol. 92), (a) per Coleridge, J.; The Patent Bottle Envelope Company *v.* Seymer, 5 C. B. N. S. 164 (E. C. L. R. vol. 94). The new object proposed in Wild's specification is at least so analogous to the old mode of fishing as to vitiate the patent. [COCKBURN, C.J.—Would it occur to a man seeing this contrivance applied to timbers placed vertically or horizontally beside one another, that it might be applied to timbers brought end to end longitudinally?] In Watt's patent—Boulton *v.* Bull, 2 H. Bl. 463, and Hornblower *v.* Boulton, 8 T. R. 95—there was not mere adaptation of the condenser from a distillery apparatus to a steam engine; the patent was supported on the ground that it was for a new combination and a new mode of doing the thing. Eyre, C. J., said, 2 H. Bl. 496, 497: "The substance of the invention is a discovery, that the condensing the steam out of the cylinder, the protecting the cylinder from the external air, and keeping it hot to the degree of steam-heat will lessen the consumption of steam. This is no abstract principle, it is in its very statement *clothed with practical application. It points out what is to be done, in order to lessen the consumption of steam." In Cook *v.* Pearce, 8 Q. B. 1044 (E. C. L. R. vol. 55), this point did not arise. In Newton *v.* Vaucher, 6 Exch. 859, there was a new result.

Secondly, it was misdirection to tell the jury that the use of channelled iron for fishing the joint in the Hackney Bridge, would not invalidate the patent if it was accidental, and did not enter into the mind of the person using the channelled iron at the time. It is not necessary that the person who first used channelled iron should be aware of its advantages, or that he should have used it for the purposes specified in Wild's patent. An unintentional prior user is sufficient to invalidate a patent within the meaning of stat. 21 Jac. 1, c. 3, s. 6. [BLACKBURN, J.—Can there be any user of a manufacture in the proper sense of the term where the person using it is not aware

(a) Affirmed on appeal, 5 Jur. N. S. 1025.

that it has the particular result? COCKBURN, C. J.—And where the user is not for the same purpose?] The discovery of the advantage of doing the thing is not the subject of a patent. In *Tetley v. Easton*, 2 C. B. N. S. 706, 739 (E. C. L. R. vol. 89), which was the case of the centrifugal pump, Cresswell, J., in delivering the judgment of the Court said: "It may be true that the plaintiff first explained the full benefit obtained but the discovery that a particular advantage was obtained by the use of a wheel known before, in a manner known before, cannot be called an invention or application to sustain a patent." If a person accidentally makes a machine, of the advantages of which he is wholly ignorant, another person could not afterwards take out a patent for that machine; the first person is the inventor of the machine *as far as regards the user of it, so as to defeat another patent. In *Carpenter v. Smith*, 9 M. & W. 300, 1 Webst. Pat. Ca. 531, no one could look into the lock so as to see how it was made. User of an invention must be tested, not by the knowledge of the party using it, but by the effect produced upon the minds of the persons seeing it. If a skilled person seeing the channelled iron at the Hackney Bridge, would say that it was a fish, then there was a user sufficient to invalidate Wild's patent. [COCKBURN, C. J.—There is no evidence whatever that any person had so recognised it.] The question is not whether the user was in a place in which the public were likely to see it, but whether the manufacture had been used as such, and not merely by way of experiment.

COCKBURN, C. J.—I am of opinion that this rule ought to be discharged.

The first point is, whether Wild's invention, as patented, can, in point of law, reference being had to the facts, constitute a good subject-matter of a patent. It appears to me that Wild was entitled to take out a patent for his invention. It is true that the use of grooved plates of iron with bolts with heads and screws, the heads of the bolts being fixed in the groove, had previously been applied to the purpose of connecting and fastening timbers placed vertically upon one another, or placed horizontally side by side. Wild, however, proposed to apply the contrivance to what is called fishing, that is, the fastening timbers placed together in a wholly different and new position, viz., longitudinally, end to end, in contact with each other. It was admitted by the defendants, and after the findings of the jury it *208] would be *assumed, that the application of this mechanical contrivance to that purpose was useful. Now, although the authorities establish the proposition that the same means, apparatus or mechanical contrivance cannot be applied to the same purpose, or to purposes so nearly cognate and similar as that the application of it in the one case naturally leads to application of it when required in some other, still, the question in every case is one of degree whether the amount of affinity or similarity which exists between the two purposes is such that they are substantially the same; and that determines whether the invention is sufficiently meritorious to be deserving of a patent. In this case, I think the purpose for which these things had been used is sufficiently distinct to warrant us in holding that Wild's invention may be the subject of a patent, and it is unnecessary,

in so holding, to infringe upon any of the authorities which lay down the proposition I have stated.

The second point is whether, by the previous user of this mechanical contrivance, there has been an anticipation of Wild's invention, which prevents him from sustaining his patent. The facts are very simple. The channelled iron with bolts having been used for the purpose of fastening timbers placed vertically upon each other in various railway bridges, by the late eminent engineer, Mr. Brunel, it happened that on one of the bridges there was a scarf-joint which it became necessary to fish ; and, having a channelled or grooved iron running longitudinally the whole length of the bridge, for the purpose of supporting its flooring he used that as one of the plates whereby to fish the scarf-joint, but without requiring in that particular place those *things which are the essential purposes for which Wild used his invention ;—that is to say, the strengthening of the iron of the plate, and the fixing of the bolts by making the heads firm in the groove, so as to prevent them from turning. He used the channelled iron simply because it was there, just as he would have used a flat surface of iron if the other had not been there, without any reference to, or any knowledge of, the purposes for which Wild's invention was patented,—in total ignorance (so far as we are informed), as regards the fishing of rails on railways, of the results claimed by Wild. On this part of the case the question is, whether the accidental use of a piece of machinery (forming part or the whole of a mechanical contrivance, which may be applied afterwards to some ulterior purpose), without any intention of producing the result, is such a user of the invention as prevents a patent from being taken out by another person ; and this turns upon what is the meaning of the language in the Statute of Monopolies, 21 Jac. 1, c. 3, s. 6, that letters patent may be granted for "the sole working or making of any new manufactures" "which others at the time of making such letters patent and grants shall not use." Clearly the statute means what others have invented and used knowingly for the same purpose for which the person who afterwards comes forward as the inventor, and obtains a patent, intends to use it. I go the length of saying, that even if this had been done upon a railway, it would not have prevented a subsequent patent from being taken out. Suppose that when railway fishes were made, not of grooved but of flat iron (as they were before Wild's patent), a person employed in fishing the joints of a long extended line of railway finding a piece *of grooved iron, had by accident taken it up and used it in one part of the railway instead of a piece of flat iron, without any intention of producing those additional advantages which result from the application of Wild's invention, or any thought of the advantages which such an application would produce, but still producing them ; I cannot think that it would be the true construction of the statute, and certainly it would be an impolitic and inconvenient construction, to say that a man who afterwards bona fide invented and discovered that the application of channelled iron for the holding of bolts for fishing railways would be attended with most beneficial results should be prevented from patenting his invention.

Therefore, upon both the grounds, the rule must be discharged.

HILL, J.—I am of the same opinion. Two questions have been discussed. First, whether the invention of the patentee is lawfully the subject-matter of a patent, and, secondly, whether the patent is invalidated by reason of an alleged prior use of the invention.

First. The patent is "for improvements of fishes and fish-joints for connecting the rails of railways." It is admitted, and has been in effect found by the jury, that the invention produces a decidedly beneficial result, and is useful. But it is said that the application of the combination of grooved iron and bolts with heads to fish-joints for connecting the rails of railways, is not lawfully the subject-matter of a patent, because such a combination has been used in joining timbers together in some cases, although it has never been applied to joints of rails which meet end to end flush, nor to joints of timbers *211] *which meet in a similar way; although such application would be both beneficial to the public and advantageous to persons desiring so to join rails.

If it is borne in mind that these fish-joints, or such a combination for joints which meet end to end, or any similar joints, have not been used before, it will be found that the cases uphold this as a good subject-matter for a patent. Lord Eldon, in *Hill v. Thompson*, 1 Webst. Pat. Cas. 235, 237, says distinctly, "There may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials." Abbott, C. J., in *The King v. Wheeler*, 2 B. & A. 345, 350, speaking of what a patent may extend to, says: "It may perhaps extend also to a new process to be carried on by known implements, or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better or more useful kind." In *Brunton v. Hawkes*, 4 B. & A. 541, 550 (E. C. L. R. vol. 6), which was strongly relied on by Mr. Bovill, Abbott, C. J., uses this language in speaking of the anchor, "Formerly three pieces were united together; the plaintiff only unites two; and, if the union of those two had been effected in a mode unknown before, as applied in any degree to similar purposes, I should have thought it a good ground for a patent." In *Crane v. Price*, 4 Man. & Gr. 580, 603 (E. C. L. R. vol. 43), which has never been questioned as to this part of the judgment, Tindal, C. J., says, "There are numerous instances of patents which have been granted where the invention consisted in no more than the use of *things* already known, the acting with them in a *manner* already known, the producing effects already *known, but producing those effects so as to be *212] more economically or beneficially enjoyed by the public. It will be sufficient to refer to a few instances," and then he mentions several, which it is unnecessary for me to read. Therefore, upon the view of the facts which have been so fully stated by my Lord, the authorities bear out the proposition that this is lawfully the subject-matter of a patent.

Upon the second question, whether the patent is invalidated by reason of the alleged prior use, the Lord Chief Justice has stated the facts so fully that it is not necessary for me to refer to them. I entirely subscribe to the reasons which my Lord has given; and I am prepared to apply the test which I suggested during the argument of

Mr. Knowles,—whether, if this patent were upheld, it would interfere with or prevent the parties, who are alleged to have used the subject-matter of the invention before, from continuing to enjoy that which they say was a prior use of it. The present patent would not interfere with or prevent them in the slightest degree; and that is really a good test to try whether what they did is or is not a user of that which is the subject-matter of the patent now set up.

I am therefore of opinion, on both grounds, that the rule must be discharged.

BLACKBURN, J.—I am of the same opinion. The first question is whether that part of the specification which, upon the evidence, was new, is or is not in itself the subject of a patent, so as to make the invention which the plaintiffs now claim a new invention at the time Wild took out his patent. Wild claimed, amongst other things, "firstly, the constructing fishes for connecting *the rails of [*213 railways with a groove adapted for receiving the heads of the bolts or rivets employed for securing such fishes;" and that claim is in a patent which is taken out for "improvements in fishes and fish-joints for connecting the rails of railways." The question which I understand the Lord Chief Justice left to the jury was, whether the use of the grooved fish, for the double purpose of holding the bolt-heads fast and giving additional strength to the metal, was new at the date of Wild's patent? And for determining that, subordinate questions were left to them, upon which they found in substance, first, that the use of grooved iron in the fastening of beams, for the double purpose contemplated by Wild's patent, was known before the date of his patent; but that the fastening of the timber in the bridges constructed by Mr. Brunel, being the instances of user referred to, was not fishing. I understand the meaning of that answer of the jury to be—that the invention, as applied to the fishing of rails on railways, which was all that Wild claimed, was new, and was useful as applied to that purpose, unless the fact that a similar grooved iron had been used for fishing the beams of bridges, in the way described, did, as a matter of law, prevent their saying that it was new.

Taking that view of the matter, it seems to me that the question is one of degree. It is now well established that a patent for a new combination of old things is good if the result be beneficial. It is also well established that the application of an old principle to what is practically the same object; as in the examples ordinarily given of scissors, which were first invented for cutting cloth, and afterwards used for cutting silk; or a spoon, used for eating soup, and afterwards used for *eating peas,(a) in which it is plain that there [*214 is no new invention, is not a matter for which a patent can be taken out. Between these two extremes—between the simple case of the scissors and the case in which there is a combination of old matters brought together so as to make a most complicated machine, as that in *Lister v. Leather*, 8 E. & B. 1004 (E. C. L. R. vol. 92),(b) and that in *Potter v. Parr*,(c) (not reported), it is difficult to draw the line, and

(a) These were the illustrations used by Lord Abinger in *Losh v. Hague*, 1 Webst. Pat. Ca. 202, 208.

(b) Affirmed on appeal, 8 E. & B. 1031 (E. C. L. R. vol. 92).

(c) See this case, post, p. 216.

say where the invention commences. The real principle is laid down, by Lord Tenterden, in *Brunton v. Hawkes*, 4 B. & A. 541 (E. C. L. R. vol. 6), where I understand him to say, that it is a question as to the degree to which the thing has been done in a mode known before, as applied to a similar purpose. Lord Tenterden was speaking of the application to anchors of a mode of putting on the head, which had been used as applicable to a variety of things; and in his opinion the matter for which the patent was taken out was not new, for it had been done in a mode that was known before as applied to a similar purpose. I am not sure whether the matter is a question for the jury, or for the Court. But if it be a question of fact, the jury have found for the plaintiffs, because they find that this was a new and useful invention as applied to railways, unless the application of it to the timbers of a bridge, in a manner that was not fishing, was such as in point of law to deprive the invention of novelty. If it be a question of law for the Court,—which I am inclined to think it is not,—I have come to the conclusion, that this is not such a similar purpose as to deprive the patent of novelty.

*As to the second question, the jury found "that the fastening of the scarf-joint of the longitudinal beam at the Hackney Bridge was a fishing of that joint, but that the use of the channelled iron as one of the plates of the fish arose from its being already there for the purpose of fastening the beams and the iron together, and was not adopted by Mr. Brunel with reference to or in contemplation of the special advantages in fishing contemplated by Wild's patent." Then does this finding of the jury show that the invention, for which Wild's patent was taken out, was in public "use" within the meaning of that word in sect. 6 of the Statute of Monopolies, 21 Jac. 1, c. 3, which avoids a patent unless it be for some manufacture, "which others at the time of making such letters patents and grants shall not use." I think that it is not. A man cannot be said to "use" a manufacture in the sense in which the word must be understood in this statute, and as it would ordinarily be understood, when accidentally, and without any knowledge or intention, he produces that which, if it were knowingly and intentionally done, and for the purpose of trade, would be a manufacture. That construction of the word is countenanced in *Morgan v. Seaward*, 2 M. & W. 544, where the question came to be, whether the patent was avoided by the making of one of the machines by the patentee himself in this country, for the purpose of sending it out to Venice. Parke, B., in delivering the judgment of the Court, seems to have had in his mind throughout the idea of using the machine as a manufacture; though to some extent the intention with which and the mode in which it is done are to be considered together. I think that, taking the finding of the jury altogether, this was not *a public use of the thing as a manufacture, but merely an accidental stumbling on it; though I would not be understood to say that I think it is essential to the public use of a manufacture, that the man who uses it must at the time have full knowledge of all the advantages which will arise from the user. I can imagine cases in which he might use the thing as a manufacture, when, although there were many incidental advantages of which he was not aware, still his so using it might prevent another

person from taking out a patent for those incidental advantages afterwards. That question however does not arise here. Upon the finding of the jury, this invention of Wild has not been used in any sense which can be called a use of it as a manufacture.

COCKBURN, C. J.—My brother Crompton, who has gone to Chambers, so far as he heard the argument, agrees with the view which we have taken.

Rule discharged.

POTTER v. PARR and others.(a) April 30, 1860.

The declaration contained one count for the infringement of a patent dated 21st December, 1836, for "certain improvements in spinning machinery," and a second count for the infringement of a patent, dated 25th May, 1842, for "certain improvements in machinery for spinning cotton, flax, and other fibrous substances."

The defendant pleaded, among other pleas, 1st, not guilty; 11th, that the alleged invention in the declaration lastly mentioned was not a new invention, and 12th, that the plaintiff did not within six calendar months cause to be enrolled an instrument in writing particularly describing and ascertaining the nature of the alleged invention and in what manner the same was to be performed.

Issues thereon.

In the specification of the patent of 21st December, 1836, the plaintiff declared his invention to consist "in the construction and arrangement of certain machinery for the purpose of rendering the spinning machine *called the mule, as well as the preparation machine known by the name of the stretcher, what is commonly called self-acting, or more independent of the spinner or operative who attends such machine." After describing, by reference to annexed drawings, the manner in which this was to be performed and carried into effect, he proceeded, "Although I lay no claim whatever to the individual or separate parts of which the machine is constructed, or any of the well known arrangements which are common to ordinary mules and machines of this class, yet I do distinctly claim as my invention,

"First, the spiral drum *Z* and the hyperbolic screw *z*, and [by] which, in conjunction with the chain wheel and chain, I effect the winding or motion as already described. But I do not confine myself exclusively to the hyperbolic screw, as the curve may be varied by using a different form of spiral drum; but I claim the application of a symmetric curve to that part of the winding-on motion of the self-acting mule. And likewise I claim the application of two spirals, as shown at figures 7 and 8, at each end of the drum, in whatever way or manner the change from the spiral figure 8 to the spiral figure 7 may be effected; and, further, as the motion imparted to the spindles by the putting up of the carriage is by me, in my present arrangement, made to assist the drum in winding on, so, on the other hand, if the spindles are made to revolve in the opposite direction to that given by the drum, the spiral throughout will have to be made proportionately larger.

"Second, I claim the arrangement for taking in the carriage by means of a revolving arm or crank, with the appendages, already described.

"Third, I claim the section *U*, in conjunction with a varying stop, regulated and put in motion, as described, for effecting the backing-off motion.

"Fourth, I claim the general arrangement of the mule head stock in a perpendicular position, as set forth and described; and likewise the arrangement for putting the bevels which drive the drawing rollers in and out of gear, together with the bevels which draw out the carriage by means of one movement, as described; and likewise the arrangement for putting down and lifting up the faller wire by means of the cam *T*, as already described; and likewise the arrangement by which one revolution of the shaft by which the wheel *G* and its appendages are placed to govern the motions of the self-acting mule, as already described."

In the specification of the patent of 25th May, 1842, the plaintiff declared the nature of his invention "to consist in certain various improvements or arrangements of machinery to be applied to the spinning machine called the self-acting mule, for which I obtained an English patent bearing date the 21st December, 1836." After describing the manner in which these improvements were to be constructed and applied to such machines, so as to perform or carry his invention into effect, by

(a) See ante, p. 214, note (a).

part of the machine; he does not confine himself to the hyperbolic screw; he claims the spiral drum, the hyperbolic screw and the chain for the purpose of producing the winding-on motion. The only doubt in my mind was whether, in the defendants' machine, there was not a combination of mechanical equivalents substituted for those in the plaintiff's machine for producing the same result. But I think this case is within the authority of *Seed v. Higgins*, on appeal, 8 E. & B. 771 (E. C. L. R. vol. 92), and that the defendants' plan of producing the varying circumference is not a mechanical equivalent. The same result is worked out in a different way, and therefore the defendants have not infringed the plaintiff's patent.

BLACKBURN, J.—As to the second count, the question is whether, upon the evidence, the defendants are entitled to a verdict on the 12th plea. I agree that they are. We must look at what the plaintiff claims; and if part of that had been published or used before the date of the patent, it was not then new, and it is immaterial whether it had been invented before by the plaintiff himself or by another person, and whether it had been patented before by the plaintiff or by another person. The specification of 1842 claims improvements on the machine of 1839, and therefore the second patent is not new.

That brings us to the question whether the machine of 1839 is part of the claim of 1842. I think it is clear that the specification does not claim the machine of 1836, but that it does introduce the machine of 1839; because sheet 2 includes a great deal of the machine of 1839, and what follows cannot be considered as a disclaimer. Then as to whether on the plea of not guilty there is evidence of infringement of the patent of 1836, I agree with Bramwell, B., in *Seed v. Higgins*, on appeal, 8 E. & B. 771, 776 (E. C. L. R. vol. 92), that we must first find, as a point of law, *222] what the specification of 1836 claims, *and then examine what the alleged infringement is. That patent is more difficult to understand than the other: but though I have had some doubt, I think the plaintiff does not claim merely the right of causing the surface to vary in any way (I am not sure whether such a claim would be good), but a varying speed by varying the motion by means of a spiral drum and a screw capable of some variation. I find nothing claimed except the doing something by means of a screw with other things. Now nothing is an infringement which does not amount to doing the same thing or its equivalent, and I do not find in the defendants' process any use of a screw, hyperbolic or otherwise; and therefore the defendant has not infringed the patent of 1836.

Rule absolute.(s)

(a) The arguments and judgments in this and the principal case have been partly compiled from the note books of the late T. F. Ellis, Esq., and Francis Ellis, Esq.

IN THE EXCHEQUER CHAMBER.

HARWOOD and Another, Executors of C. H. WILD, v. THE GREAT NORTHERN RAILWAY COMPANY. Feb. 3.

For head-note, see ante, p. 194.

THE defendants having appealed against the above decision, the case was argued before Pollock, C. B., Channell and Wilde, BB., and Williams, Willes, and Byles, JJ., in Trinity Term, June 13th, 14th, 1861.

Bovill (*C. E. Pollock and Horace Lloyd* with him) for the defendants.—The term "fishing" is derived from *affiché*, and was originally applied to splicing a mast with a splint, and thence was introduced into carpentry: see *Tredgold on Carpentry*. [*CHANNELL, B.*, referred to *223] *Falconer's "Marine Dictionary*, by *Burney(a)*] [The argument and cases cited were the same as in the Court below.]

(a) "Fish-Front, or PAUNCH, (*jumelle*, Fr.) is a long piece of oak or fir timber, convex on one side and concave on the other, used to strengthen the lower masts or the yards, when they are sprung, or have received some damage in battle or in tempestuous weather, &c., to effect which they are well secured by stout rope, called wibolding."

Grove (Hindmarch and T. Webster with him), for the plaintiffs.—First, Wild's invention, as applied to fishes for rails of railways, contrasted with the use of grooved or channelled iron, in the construction of bridges where there is no scarf or joint, is the subject of a patent. The manner in which, and the purpose for which, the channelled iron was used in the timber bridges on railways were different from those in Wild's patent. In the timber bridges the channelled iron buckles on the transverse planks which support the flooring to the main beams, and resists vertical pressure; and the jury found that in those bridges there was no fishing. [POLLOCK, C. B.—Suppose the jury found two things to be different, and it appeared to the eye and mind of the Court that they were the same, the Court would be bound to say that the two things were the same, and that there was no invention; in that case the finding of the jury would be immaterial. Independently of the finding of the jury, it is clear that the channelled iron in those bridges had nothing to do with fishing.] In Wild's patent the object is to make the rails like one continuous piece of iron, and mainly to resist lateral as well as vertical pressure; also, by making the head of the screws square, to prevent the bolts from unscrewing—thus two incidental advantages are obtained by the variations in Wild's patent. There *is no case in which a patent has been avoided on the ground of want of novelty in the subject-matter where there [*224 has been a material modification of the prior use. In *Losh v. Hague*, 1 Webst. Pat. Ca. 202, the wheel used on a common road was patented by the plaintiff for use on a railway. In *Brunton v. Hawkes*, 4 B. & A. 541 (E. C. L. R. vol. 6), the plaintiff claimed to do, with ships' anchors having two flukes, what had been done with the mushroom and the adze anchors. In *Tetley v. Easton*, 2 C. B. N. S. 706 (E. C. L. R. vol. 89), which was a very complex case, the wheel had been anticipated in a previous patent. In *The Patent Bottle Envelope Company v. Seymer*, 5 C. B. N. S. 184 (E. C. L. R. vol. 94), a well-known tool was applied to previously untried materials. In *The Queen v. Cutler*, 3 C. & K. 215, 228, Macr. Pat. Ca. 124, the tubes, which had been used before, were applied in a known manner to a new use. In *Brook v. Aston*, 8 E. & B. 478 (E. C. L. R. vol. 92), (a) the identical machine was applied in the old manner to a similar or analogous material. In some of the cases in which the patent was upheld, as in *Crane v. Price*, 4 M. & Gr. 580 (E. C. L. R. vol. 48), there was nothing of invention, but a better and cheaper result was produced by the use of anthracite coal combined with a hot air blast in smelting iron. Tindal, C. J., said, p. 602–603, “We are of opinion, that if the result produced by such a combination is either a new article, or a better article, or a cheaper article to the public than that produced before by the old method, such combination is an invention or a manufacture intended by the statute, and may well become the subject of a patent.”] [POLLOCK, C. B.—The decision in that case was carped at at the time, but the *ground of it is this, that nobody could by possibility tell what [*225 the result would be if the hot air blast was applied to anthracite coal, which had never been used before in smelting iron. The Court considered iron produced at a cost of 2*l.* per ton a different substance from iron produced at a cost of 4*l.* per ton.] In *Hall v. Jarvis*, 1

(a) Affirmed on appeal, 5 Jur. N. S. 1028.

Webst. Pat. Ca. 100, and 409, note (f), the gas flame, for singeing off the superfluous fibres of lace, produced a better article and made a change in the subject-matter. In *Newton v. Vaucher*, 6 Exch. 859, the application of the lining of soft metal to a purpose different from that for which it had been first patented was held to be the subject-matter of a patent. [POLLOCK, C. B.—The patents in those cases were for improvements in machinery.] There is a broad distinction between discovery and invention: a person discovers a principle, invention is the new application of a principle. In *Higgs v. Goodwin*, E. B. & E. 529 (E. C. L. R. vol. 96), it was held that, the purpose for which the chemical agent was used being different, there was no infringement. [POLLOCK, C. B.—In that case the defendant had no purpose in using the process and chemical agent specified in the plaintiff's patent. In the case of machinery and chemical results, I can understand the difference of purpose being material; but a chemical product discloses nothing to the public.] The Court will look at the subject of the patent. Where a change in the form of the material or in the mode of operating is essential for obtaining a successful result, there is invention,—consisting in the new adaptation or the new end accomplished.

Secondly, the accidental user of the fishing by Brunel, in the Hackney Bridge, does not avoid Wild's patent. Though the thing was in existence, and the public might *have seen it, there was no public use of it. If a person, who first obtains a new and valuable result, is in ignorance of that result, he has not made an invention; and does not prevent another person who discovers the same result from taking out a patent: *Minter v. Mower*, per Lord Denman at nisi prius; 1 Webst. Pat. Ca. 138, 140, s. c. in banc, 6 A. & E. 735; *Hills v. The London Gas Light Company*, 5 H. & N. 312. Suppose a man pours three liquids into a bottle which produces an important result, but it is not used, that does not disclose the invention to the public. [POLLOCK, C. B.—The principle on which a patent in chemistry may be attacked or supported is different from that on which a patent in mechanics may be attacked or supported. There is considerable difficulty in getting any clear principle in any one branch of patent law: the only subject of a patent mentioned in stat. 21 Jac. 1, c. 3, is a new "manufacture," and probably that was the only subject-matter originally intended; but patents are now continually taken out for processes and machines. All these admit of different considerations. If a man has made an article by machinery or by chemical process, and has issued it largely as an article of commerce, he could not take out a patent for it, because he has published the invention; and if so, no one else could.] It depends upon the degree of publication. [He cited *Jones v. Pearce*, 1 Webst. Pat. Ca. 122, *Stead v. Anderson*, 4 C. B. 806 (E. C. L. R. vol. 56), *Handcock v. Sommervell*, Webster on Property in Designs 59, 60, direction of Williams, J., to the jury; *Betts v. Menzies*, 8 E. & B. 923 (E. C. L. R. vol. 92)(a) and *Lister v. Leather*, 8 E. & B. 1004 (E. C. L. R. vol. 92); and *Williams, J., referred to the American case cited in Webster *227] on Property in Designs, p. 63. Further, the bars of iron placed along the under side of the Hackney Bridge would not suggest

(a) Affirmed in Exch. Ch. 1 E. & E. 1020; reversed in H. L. 31 L. J. Q. B. 233.

the improvement in fishing the rails of railways any more than the fishing of a mast would do.

C. E. Pollock (Bovill absente), was heard in reply.—Brunel, in using the channelled iron for the joint in the Hackney Bridge, did that which anybody would have done under the same circumstances. [WILLIAMS, J.—That is a question of fact for the jury. CHANNELL, B.—It is not found either way, whether there is or is not identity between the fishing of the longitudinal beams by Brunel in the Hackney Bridge and Wild's invention.] *Tetley v. Easton*, 2 C. B. N. S. 706 (E. C. L. R. vol. 89), shows that a man who sees a further result in a machine which was not in the mind of the inventor, and without alteration applies it, cannot take out a patent for its discovery. [He also referred to the finding of the jury in *Minter v. Mower*, 1 Webst. Pat. Ca. 138, 141.(a)] There was the same thing in the Hackney Bridge as in Wild's patent, and the objects were the same in obtaining strength and fixity; whether the strength acquired was vertical or lateral cannot make a material difference. *Cur. adv. vult.*

WILLES, J. (Feb. 3), delivered the judgment of the Court.

This was an action upon a patent "for improvements *in fishes and fish-joints for connecting the rails of railways." [*228]

The pleas raised the question whether the invention was new, and whether it was a good subject-matter of a patent.

The material part of the specification was as follows. [His Lordship read the beginning of the provisional specification, ante, p. 195; and the claim in the complete specification, ante, p. 197.]

It thus appears upon the face of the specification that there was nothing new in the joints of the rails, and nothing new in the process of fishing; and that the only difference between the known method and that patented consisted in the fishes being grooved, so as to hold the heads of the bolts firmly, and to require a less quantity of iron in their construction.

Now, of course, if the application of grooves in pieces of iron used for the purpose of holding pieces of other materials firmly together, with a view to the saving of materials and the better fixing of the bolts by which the necessary solidity was obtained, had been new,—which it clearly and notoriously was not,—this would have been a sufficient subject-matter of a patent. On the other hand, if the application of such grooves in pieces of iron so used had previously been made for a purpose the same as or analogous to that for which the patentee applied such grooves, and there was no novelty or invention in the mode of applying the old contrivance to the new purpose, such application, though useful and made by the patentee for the first time, in this particular instance, would not be an invention for which a patent could lawfully be granted, or, being granted, could be sustained.

*The parts of the evidence material to be considered are [*229] stated in the case as follows. [His Lordship read the evidence, ante, p. 199, beginning, "It was also proved," and pp. 200–201, and the findings of the jury in pp. 201–202.]

It appears, from the statements of the case above recited, that the alleged invention claimed by Wild as his, when applied to the pieces

(a) S. C. in banc, 6 A. & E. 735 (E. C. L. R. vol. 33).

of iron used for holding together the ends of rails to make them for practical purposes a continuous solid body, had previously been known and used as applied to pieces of iron used for holding together the broad sides of pieces of wood placed vertically upon one another, to make them for practical purposes a continuous solid body. In each case the benefit contemplated and effected was effected by means of the groove, which gave lightness with strength to the binding iron, and served to hold the heads of the bolts steady whilst the nuts were being screwed on at the other end. This was the one mechanical contrivance used in each case. It was complete in itself when first invented; and, though not immediately applied, it was immediately applicable to all forms of pieces of iron used for holding together other materials by the aid of bolts having a bearing upon the pieces of iron. It required no new invention, but merely an application of the mechanical contrivance already invented and used,—to employ it upon several strips of iron instead of one strip of iron, to hold together iron instead of wood, materials placed together horizontally instead of materials placed together vertically, solids the small ends of which are in contact instead of solids the broadsides of which are in contact, rails instead of beams.

*Indeed it further appears from the facts recited that the
[230] invention in question had been previously applied to pieces of iron used for fishing in the instance of the Hackney Bridge.

The counsel for the plaintiffs endeavoured to get rid of the effect of this by contending that Mr. Brunel made use of the grooved iron only because it was lying at the place, and other iron was not in readiness, and that in using it he did not contemplate the "special advantages" in fishing contemplated by Wild's patent.

Now this expression, "special advantages," is a vague one, and calculated to mislead unless its true meaning and value be ascertained. It is clear, even from the specification, that such special advantages do not include any difference, much less improvement, in the grooves, or in the mode of making them or applying them to the rails, or anything other than the application of grooves to fishing rails. It follows that the statement, that Mr. Brunel used the grooved iron for fishing without reference to the "special advantages" of Wild's patent, means nothing more than that he did not know of or refer to the use to which the grooved iron could be put in fishing rails. It stands that he used it for fishing, and it is not proved or suggested that he was ignorant of the advantages in point of strength combined with lightness and the holding of the heads of the bolts whilst the nuts were being screwed on. Indeed the paragraph immediately following the description of the bridge states the contrary. It would be erroneous to describe this as a case in which the person who used the contrivance was ignorant of the principle and of its beneficial action in the particular instance, though we by no means say *that prior use of
[231] an invention is to be of no avail because the principle upon which it acts was either unknown or misapprehended.

We need not however advert further to the considerations arising out of the use of the grooved iron for fishing in the Hackney Bridge; because in our opinion, quite independent of the use at that bridge, the use of grooves in pieces of iron for holding materials together by

means of bolts and nuts had been given to the world, together with all its advantages, before the date of Wild's patent; and Wild's alleged invention was a mere application of that old contrivance, in the old way, to an analogous subject, without any novelty or invention in the mode of applying such old contrivance to the new purpose. And an application such as this does not make a valid subject-matter for a patent. See *Tetley v. Easton*, 2 C. B. N. S. 706 (E. C. L. R. vol. 89); *Brook v. Aston*, 8 E. & B. 478 (E. C. L. R. vol. 92); s. c. in error, 28 Law Journ. Q. B. 175; 5 Jur. N. S. 1025.

The judgment of the Court below to the contrary effect must therefore be reversed, and the rule must be absolute to enter a verdict for the defendant upon the pleas denying the novelty of the invention and that it was the subject-matter of a patent.

Judgment reversed, and rule absolute accordingly.

*WRIGHT v. WILKIN. [Nov. 27, 1860.]

[*232

Devise.—Condition.—Trust estate.—Statute of Mortmain.

A testatrix by her will, after giving several legacies, some of which were legal and others void as being contrary to the Mortmain Act, 9 G. 2, c. 36, proceeded as follows: "I give, devise and bequeath to T. M. W. all my real estates, both freehold and copyhold, and all the residue of my personal estate and effects, to hold to him the said T. M. W., his heirs, executors, administrators and assigns, for ever, upon this express condition, that if my personal estate should be insufficient for the purpose, he or they do and shall, within twelve months after my decease, pay and discharge all and every the legacies hereinbefore bequeathed. And I feel confident that he will comply with my wish, it being my particular desire that all the above legacies shall be paid. And I do hereby charge and make chargeable all my said real and personal estate, with the payment of the aforesaid legacies and bequests." The testatrix nominated and appointed W. S. and A. C. executors and trustees of her will; and the will contained the ordinary clauses for the protection of trustees. There were codicils of subsequent dates which did not vary the disposition in the will. The personal estate was insufficient for the payment of the legacies, and T. M. W. did not, within twelve months after the decease of the testatrix, pay any of them. Held, by this Court and affirmed by the Exchequer Chamber, that the words "upon express condition" did not create a condition for breach of which the heir might enter; but created a trust which the defendant, taking the legal estate, would in equity be bound to perform.

THIS was an action of ejectment for the recovery of a farm and divers lands and dwelling-houses: being the freehold and copyhold hereditaments of which one Mary Mann died seised.

On the trial, before Cockburn, C. J., at the Spring Assizes for the county of Norfolk, in 1860, the heirship of the plaintiff to Mary Mann, as to 17 acres (part of the land mentioned in the writ of ejectment), was admitted by the defendant, and, as to the residue of the land, the question of pedigree was reserved for the decision of the learned Judge in the event of the plaintiff having a verdict. The defendant relied on the due execution by Mary *Mann of a will and [*233 codicils thereto. The will bore date 15th May, 1854, and was

"First I nominate and appoint W. Seppings and A. Carter, both of King's Lynn, gentlemen, executors and trustees of this my will, and give to each of them, the said W. Seppings and A. Carter, the sum of 100l. for the trouble they may have in the execution of this

my will over and above their necessary costs, charges and expenses. And I direct that all my just debts, funeral and testamentary expenses shall be fully paid and satisfied, as soon as conveniently can be after my decease, out of my personal estate and effects. And it is my urgent request, and I hereby desire, to be buried in the chapel of Tilney Saint Lawrence, in the county of Norfolk, in which parish my dear deceased parents and relatives are buried. And I give and bequeath unto my two servants, Jane Burton and Sarah Burton, all my household furniture of every description (save and except as hereinafter mentioned), for their use absolutely, to be divided between them; and I hereby request that the said J. Burton and S. Burton shall reside in my dwelling-house for three months next after my decease free of every expense; and that my executors will, during that time, pay for their maintenance and support and all rates and taxes and other outgoings on account of my said dwelling-house out of my personal estate. And I give and bequeath all my linen and wearing apparel of every description unto M. Hemington, of King's Lynn aforesaid, spinster. And I give unto the Rev. W. Coulcher my watch, plate and trinkets. And I give and bequeath unto the said W. Seppings an engraving, framed and glazed, of 'The Deluge.' *284] And I give and bequeath unto my young friend F. A. Jarvis two engravings, framed *and glazed, one being 'Belshazzar's Feast' and the other 'The Fall of Babylon.' And I give and bequeath unto M. Hemington the sum of 200*l.* And I give and bequeath unto my servant, the said J. Burton, the sum of 500*l.*, and to my other servant, the said S. Burton, the sum of 200*l.* And I give to my said executors the sum of 10*l.*, to be paid to and divided between the four poor women who shall at my decease be living in the South Lynn Almshouses, called Valinger's Almshouses. And I give and bequeath to my friend Mr. L. W. Jarvis the sum of 400*l.*, and to his son, L. W. Jarvis, the like sum of 400*l.* I give and bequeath to the treasurer at the time being of the Lynn and West Norfolk Hospital the sum of 200*l.*, to be applied towards carrying on the charitable designs of the said Institution. And I give and bequeath unto the vicar and chapelwardens of Tilney St. Lawrence aforesaid the sum of 50*l.*, to be distributed by them amongst the poor belonging to that parish as the said vicar and chapelwardens shall think proper; and I direct my said executors to pay and distribute amongst such of the poor as they may consider objects of charity, living in All Saint's Street in South Lynn at the time of my decease, the sum of 50*l.* :—and which two sums of 50*l.*, I direct shall be paid within three months after my decease. And I give and bequeath unto the said vicar and chapelwardens of Tilney St. Lawrence for the time being aforesaid the further sum of 800*l.*, which I direct them to invest in some or one of the public stocks or funds of Great Britain, and to apply the dividends and annual produce thereof towards the keeping up and repairing of the said chapel of Tilney St. Lawrence aforesaid for ever. And I give and bequeath unto the Rev. Wm. Currie, of Tilney aforesaid, *285] *the sum of 19*l.* 19*s.* And I give, devise and bequeath unto Thomas Martin Wilkin, of Furnival's Inn, in the city of London, gentleman, all my real estates, both freehold and copyhold, in Tilney St. Lawrence, Tilney All Saints, and elsewhere in Great Bri-

tain, and all the residue of my personal estate and effects, to hold to him the said T. M. Wilkin, his heirs, executors, administrators and assigns, for ever, upon this express condition, that if my personal estate should be insufficient for the purpose, that he or they do and shall, within twelve months after my decease, pay and discharge all and every the legacies hereinbefore bequeathed. And I feel confident that he will comply with my wish, it being my particular desire that all the above legacies shall be paid. And I do hereby charge and make chargeable all my said real and personal estate with the payment of the aforesaid several legacies and bequests. And all estates vested in me as trustee or mortgagee I give and devise unto and to the use of the said T. M. Wilkin, his heirs, executors, administrators and assigns, for all my estate and interest therein. And I declare it to be my will that my said trustees, or the survivor of them, or the executors or administrators of such survivor, shall be answerable and accountable for such money only as they respectively shall actually receive by virtue of this my will; and that one of them shall not be answerable or accountable for the other of them, but each for his own acts only; and also that it shall and may be lawful for them, or either of them, by and out of the moneys which shall come to their hands, to retain to and reimburse themselves respectively all such reasonable and necessary costs and charges which they or either of them shall or may sustain, expend, be at, or be put unto, in or about the execution of this my will. And, hereby revoking all former wills by me made, I do declare this writing to be and contain my last will and testament." [*236]

The first codicil bore date 1st November, 1854, and was as follows: "Whereas I, Mary Mann, of South Lynn, All Saints, in the borough of King's Lynn, in the county of Norfolk, spinster, having made and duly executed my will, bearing date the 15th day of May, 1854: now I declare this present writing to be a codicil to my said will, and I direct the same to be annexed thereto and taken as part thereof. And whereas I have by my said will given and bequeathed to L. W. Jarvis, the son of the said L. W. Jarvis, the sum of 400l.: now also I revoke the said legacy so given to the said L. W. Jarvis. And whereas I have by my said will given and bequeathed unto my servant, Jane Burton, the sum of 500l., and to my other servant, Sarah Burton, the sum of 200l.: now I hereby ratify and confirm the said several legacies; and in addition thereto I give and bequeath to my said servant, the said J. Burton, the further sum of 500l., and to my said servant, S. Burton, the further sum of 300l. And I ratify and confirm my said will in every respect, except where the same is hereby revoked and altered as aforesaid."

The second codicil was as follows: "Whereas I, Mary Mann, of South Lynn, All Saints, in the borough of King's Lynn, in the county of Norfolk, spinster, having duly made and executed my will, bearing date the 15th day of May, 1854; and whereas, I also duly made and executed a codicil to my said will bearing date the 1st of November, 1854: now, I declare this present writing to be a second codicil to my said will, and I direct the same to be annexed to my said *will and taken as part thereof. And whereas, I have [*237] by my said will and codicil respectively given and bequeathed to my

condition that all the legacies were paid, some of them being void, and Sir John Leach, M. R., held that they were to be considered as a charge upon the gift to the wife, and therefore she, and not the heir, *241] was entitled to the *benefit of the failure of those legacies. In Hubbert *v.* Spencer, 5 Vin. Abr. 59, *Conditions* I. pl. 5, (a) "C. devised a manor to his wife for 30 years, *for and to the intent and purpose*, that his wife shall pay 30*l.* yearly during the term to A. and others; and further devises, that his wife should be bound to A. and the others to perform the will. This was held to be no condition; for to what purpose should his wife be bound if this was a condition? But judgment was not given because the parties agreed." [They also cited Poor *v.* Mial, Madd. & Geld. 32.] A charge of real estates with the payment of debts creates a trust to mortgage or sell for the payment of them: Ball *v.* Harris, 8 Sim. 485, 4 My. & Cr. 264, Sugden's Treatise of the Law of Vendors and Purchasers, 543, pl. 9, 13th ed., and cases collected in Lewin on Trusts 317, 4th ed.: and a charge with the payment of legacies must have the same effect. It is clear that the testatrix did not intend to die intestate or that the property should go to the heir. Further, if this is a condition at all, it is a condition subsequent: Edwards *v.* Hammond, 3 Lev. 132; Doe d. Hunt *v.* Moore, 14 East 601; and as several of the legacies are contrary to law the whole condition is void. An estate already vested at the death of the testatrix cannot be defeated by a void condition. In Egerton *v.* Earl Brownlow, 4 H. L. Ca. 1, Crompton, J., said, p. 67, "The true doctrine seems to me to be, that a proviso which is invalid cannot be operative, either to create or to destroy. If the estate can only arise by that proviso being complied with, it fails in its creation; if the estate has once arisen, such proviso cannot destroy, *242] *and the estate remains unaffected." And Alderson, B., said, p. 101, "My opinion very clearly is, that the validity of each [proviso] is to be considered separately, and that those which are valid will have effect, even though the others should be deemed invalid. The true principle in all these questions is, as is laid down in our books, that where a testator involves in one and the same set of words several contingencies, some legal and others illegal, all are void,—if any one is so; because you cannot say whether he meant more than one contingency, nor say whether that was the legal or illegal contingency which he intended; but where he expresses separately and distinctly each contingency, it is clear that he intends not one only, but all of them, and then the Court rejects the illegal and carries the legal wishes into effect." The estate devised to the defendant is not avoided by reason of some of the legacies being contrary to the Statute of Mortmain: Doe d. Chidgey *v.* Harris, 16 M. & W. 517, 518. The devisee must take the legal estate in order to enable him to pay such of the legacies as are not contrary to the Mortmain Act, the trust as to those legacies being good: Willet *v.* Sandford, 1 Ves. Sen. 186, Young *v.* Grove, 4 C. B. 668 (E. C. L. R. vol. 56); and, if so, the estate is not divested by a condition subsequent, which is void: Ridgway *v.* Woodhouse, 7 Beav. 437. Also, there was no proof that the personal estate was not sufficient to pay the legacies, or if there was, there was no proof of a demand of payment of them, which is necessary to create a

(a) S. C. Hubberd *v.* Spencer, Benl. 287.

forfeiture: *Doe d. Biass v. Horsley*, 1 A. & E. 766, 772 (E. C. L. R. vol. 28), per Lord Denman, citing *Peirson v. Sorrel*, 2 Show. 185.

As to the second and third grounds of the rule, there *was no evidence in support of them. [COCKBURN, C. J.—The attempt to defeat the Mortmain Act, if successful, would not have benefited the defendant, because he would have had to pay all the legacies.] Further, as to the second ground, that the devise was for the purpose of defeating the Mortmain Act, the rule is that, if the condition in the instrument is to do something malum in se, the instrument is altogether void; otherwise, if the condition is only to do a thing prohibited. [He cited Co. Litt. 206 b; *Doe d. Burdett v. Wright*, 2 B. & A. 710; *Bulkley v. Wilford*, 2 Gl. & F. 102.]

In Michaelmas Term, November 27th,

W. H. Terrell, in support of the rule.—This is a devise of an estate on condition at common law, for the breach of which the heir may enter. It is unnecessary here (as in Crickmer's Case, Co. Litt. 236 b.(a)) to seek for the intention; the language is unambiguous and the condition express. But if, in Crickmer's Case, the Court, in favour of the intention, construed the language as creating a common law condition under a devise to A. and her heirs to pay unto B. a sum at a certain day, a fortiori the Court ought in this case to hold, as creating a condition, language strictly technical and appropriate for that purpose. It is the tendency of modern decisions to adopt the exact words used by testators, and not to speculate on secret intentions: *Hayward v. James*, 28 Beav. 523, 527, 528, per Romilly, M. R. To hold that a condition was not created because in modern times decisions are not to be found, would be to remove an ancient land *mark. The observation of Lord St. Leonards, that conditions are now construed as creating trusts enforceable in equity, [*244] cannot be treated as a general proposition, but as applicable only to constructive conditions, and to cases like *Anon.*, 2 Freeman 278, cited in *Messenger v. Andrews*, 4 Russ. 478, 481. Besides no authority is cited in support of the observation. In *Magennis v. Fallon*, 2 Moll. 561, 578, on a certain statement being made at the Irish bar, Hart, C., observed, "That is a position of Sugden, but there are two or three positions of Sugden which subsequent decisions have totally swept away." It is not important whether this is construed as a condition precedent or a condition subsequent—the condition was broken, and thereupon the right of entry accrued. Where an estate is devised by unambiguous language in the former part of a will, such devise cannot be modified by doubtful words in a subsequent part: *Thornhill v. Hill*, 2 Cl. & F. 22, 36, per Lord Brougham, C.; 2 Jarman on Wills 764, 3d ed., rule xii. Though the estate vested in the devisee for the purpose of paying the valid legacies, the condition is divisible, and no authority can be found for its indivisibility where the condition is partly illegal: note to *Collins v. Blantern*, Smith's Leading Cases, 5th ed., vol. 1, p. 329, 330. In this respect a condition differs from a contract made on several conditions, one of which being illegal the whole contract is void, inasmuch as every part of the contract is induced and affected by the illegal consideration: *Shackell v. Rosier*, 2 Bing. N.

(a) S. C. *Crockmere v. Patterson*, 1 Leon. 174.

C. 634, 646 (E. C. L. R. vol. 29), per Tindal, C. J.; *Howden v. Haigh*, 11 Ad. & Ell. 1033, 1038 (E. C. L. R. vol. 39), per Lord Denman.

*245] *The cases cited in *Egerton v. Earl Brownlow*, 4 H. L. Ca. 1, relied on by the defendant in support of the proposition that limitations sounding conditionally have been held to be not strict common law conditions, show clearly that this is a condition, for in all of them there were limitations over. [CROMPTON, J.—All the Judges agreed that that case was the case of a condition:—the question was whether it was good or bad.] In Butler's note (1) to Co. Litt. 203 b, conditions are recognised as still existing, and the distinction between conditions and conditional limitations is carefully drawn. The absence of a gift over distinguishes this case from the case of a conditional limitation. To comply with the direction to pay the legacies within twelve months after the death of the testatrix, it is not necessary that the devisee should have the legal estate. The judgment in *Stroughill v. Anstey*, 1 De G. M. & G. 685, shows that where an estate is given to a devisee charged with the payment of legacies, as the devisee takes the estate cum onere, he has a right to sell or mortgage it in fee, and the sale cannot be disturbed by parties entitled under the will or by the heir. [BLACKBURN, J., referred to Doe d. Jones v. Hughes, 6 Exch. 223, 281, per Parke, B.] That dictum has not been followed. The better opinion is that, in that case, a legal power was created, and that the title of a purchaser would not require the aid of an injunction against the party claiming the legal estate, but would prevail against the heir entering for condition broken: see *Robinson v. Lowater*, 17 Beav. 592; (a) *Wrigley v. Sykes*, 21 Beav. 337.

*246] In *Cooke v. The Stationers' Company*, 3 Myl. & K. 262, *relied on by the defendant, the legal fee was in the executors, and the wife's interest, if any, was merely an equitable fee, subject to the execution of the power of sale by the executors; and, as a condition cannot be attached to an equitable estate, it was properly held that no condition was created. A common law condition cannot be created without the inseparable incident of the heir's right of entry on breach. As to the condition being annexed to a mixed fund, consisting of real and personal estate, it is not sufficient to allege that no right of entry could arise as to the personal estate:—the condition must be construed reddendo singula singulis; and the executor, as to the personal estate, would be entitled to take advantage of the breach. In 2 Sheppard's Touchstone, by Preston, p. 451, it is said, "Of all these conditions, regularly, the executor and no other shall take advantage. [But unless he be executor beneficially, he will be a trustee for the residuary legatee or next of kin.]" (See also pp. 450, 417.) *Woodcock v. Woodcock*, Cro. Eliz. 795, cited in 2 Jarman on Wills, 8d ed., p. 4, shows that a condition subsequent may be annexed to the bequest of a chattel. If it be said that the testatrix could scarcely have intended the defendant to remain devisee of trust estates which are not given upon any condition, so that a mortgage debt would vest in the executor while the legal estate remained in him; the answer is, that the fact of the legal estate in a part being left outstanding is an insufficient ground for presuming that the testatrix did not intend forfeiture quoad the estates in which she had also the beneficial ownership. To throw

the onus on the plaintiff to prove an intention to create a condition would reverse the rule of presumption that the testatrix meant what she has said. *In *Egerton v. Earl Brownlow*, 4 H. L. Ca. 1, [247] 183, Lord Truro said, "As the proviso in question is in the regular form of a condition subsequent, and as it is in the very same form as the other provisos in the same will, which are unquestionably of the nature of condition subsequent, the onus of showing that it was intended to be the very opposite of that which on its face it would appear to be.—that is, the onus of showing it to be a condition precedent, lies upon those who would put that construction upon it." It was said that it would be idle to construe the limitation otherwise than as a charge, because a Court of equity would relieve against breach. It is a sufficient answer that this Court knows nothing of a charge in equity; and non constat that relief would be afforded, having regard to the necessity of the person seeking relief there doing equity, or, in popular language, coming "with clean hands." Also, it is by no means clear that relief would be afforded in a Court of equity where sometimes conditions are construed strictly, as in *Robinson v. Wheelwright*, 21 Beav. 214. If, however, a condition was not created, the language of condition must be struck out of the will with no apparent object, inasmuch as the legacies were charged by the will irrespective of the condition: *Wigg v. Wigg*, 1 Atk. 382; *Hills v. Wirley*, 2 Atk. 605; *Sonley v. The Clockmakers' Company*, 1 Bro. C. C. 81.

As to the second and third grounds of the rule. [BLACKBURN, J.—We can only look at the will, if it is duly executed.] In *Bulkley v. Wilford*, 2 Cl. & F. 102, 119, there was an absence of moral fraud in the attorney, yet Lord Eldon sent an issue to be tried by a Court of law, and held *the attorney a trustee for the devisee; and this decision was affirmed in the House of Lords. [BLACKBURN, J. 248—But we cannot deal with this matter in a Court of law if there was no undue influence, but merely misleading.] [He cited *Boyse v. Rossborough*, Kay 71,(a) before Wood, V.C., *Doe d. Burdett v. Wright*, 2 B. & A. 710, *The Attorney General v. Davies*, 9 Ves. 535.]

COCKBURN, C. J.—I am of opinion that this rule ought to be discharged. The real question is whether, by the terms of the will, a condition is annexed to the devise made in favour of the defendant, and whether that condition is such that its non-performance operates to work a forfeiture and divest the estate out of the defendant, the devisee. The testatrix, at the outset of her will, makes certain bequests and legacies, some of which are legal, and some are open to exception, as being against the provisions of the Mortmain Act, 9 G. 2, c. 36. Then she devises and bequeaths to Thomas Martin Wilkin "all my real estates, both freehold and copyhold, in Tilney St. Lawrence, Tilney All Saints, and elsewhere in Great Britain, and all my personal estate and effects, to hold to him, his heirs, executors, administrators and assigns, for ever." But to this devise and bequest she appends the following condition: "Upon this express condition, that if my personal estate should be insufficient for the purpose, he or they do and shall, within twelve months after my decease, pay and discharge all and every the legacies hereinbefore bequeathed;" and this

(e) S. C. on appeal, 3 De G. M. & G. 817.

clause immediately follows: "And I feel confident that he will comply with my wish, it being my particular desire that all my above legacies *shall be paid;" and then she goes on: "And I do hereby charge and make chargeable all my said real and personal estate with the payment of the aforesaid several legacies and bequests." The question is, whether the words which the testatrix annexes to the devise and bequest of her real and personal estate to the defendant amount to a condition absolute such as will work a forfeiture, or are to be taken as explanatory terms upon which she makes the devise and bequest to the defendant, so as to create a trust which he, taking the legal estate, is bound in equity to perform. On the best consideration which I can give, I entertain a clear and unhesitating opinion that the words in question do not amount to a condition so as to work a forfeiture.

It is not necessary, according to my construction of the will, to consider whether, even if they did amount to a condition in the strict legal acceptation of the term, there is not some provision in the will which would prevent a forfeiture. I refer particularly to the clause in which the testatrix provides that her real and personal estate shall be charged with the payment of the legacies and bequests, and thereby gives the devisee capacity to charge the estate and to alienate so much of it as may be necessary to satisfy the legacies.

The question then is, is this a condition? In my opinion, it is not. Our duty in construing a will is to give effect so far as we can to the intention of the testator, to be collected from the will; and, though some legal terms have received so clear a legal acceptation that the law will not permit them to be construed in any other sense, no authority has been cited to show that the term "condition" is one of those terms. And, unless compelled by decision and authority, I should be slow to add to the list of those terms, especially if the effect of not *allowing a term to be used in any other than its legal sense would be to defeat the clear intention of a testator. Unless this signification of a term has been finally and irrevocably settled by legal decision, I think that the true principle upon which wills should be construed is that of giving effect, so far as we can gather it from the will itself, to the intention of the testator; especially where terms are flexible in their nature, and are capable of receiving a signification according to the sense in which the devisor used them. The intention of the testatrix in this case is I think clear; it never was her intention to create a condition the non-performance of which should work a forfeiture of the estate. It is true that, at first, she says that the devise is "upon this express condition;" and, if these words had stood alone, we might possibly have been bound to hold that the condition was absolute, and that on its performance the indefeasibility of the estate depended. But this could not have been the intention of the testatrix, because the words which immediately follow are not the language which would be used by a person who was conscious that she had imposed an absolute and peremptory condition,—the consequence of non-compliance with which would be to take away the estate from the person who was the object of her bounty. She addresses herself to his sense of right; and her expectation and belief were that, as a man of integrity and conscience and honour, as

she had given him the real estate he would carry out, not her testamentary commands, but her wishes and desires.

I come next to the clause in which the testatrix charges all her real and personal estate with the payment of the legacies. I construe that to mean that she charges it in the hands of the devisee, to whom she had before given it; as she makes no *reference to the forfeiture, or to this being a charge on the estate in the hands of the heir-at-law. The effect is to give to the defendant a power to alienate or mortgage the estate for the purpose of providing funds to satisfy the legacies. Otherwise, suppose he had alienated a portion of the estate, or mortgaged the whole of it, and had failed to pay the legacies, and the heir-at-law had come in, and sought by ejectment to recover the estate against the alienee or mortgagee; if the payment of the legacies was a strict condition, what defence would there be to the action? Mr. Terrell says that whenever a person, having power to do so, charges an estate, the heir-at-law would be restrained in equity from displacing the person in whose favour the alienation or charge had been made. But where is the answer at law in the case of a person so dealing with an estate defeasible upon a given contingency, if that contingency happens? I have always understood the rule of law to be, as given in a book of the highest authority, that a man cannot convey an estate or give rights other than those which he himself has. With the assistance of equity, the title might possibly be confirmed. But that is not a marketable title; and yet, according to the terms of this will, it would be part of the duty of the devisee to alienate or charge the estate for the purpose of paying the legacies. I think that is very strong to show that the testatrix never contemplated the possibility of the legal estate being taken out of the devisee, even if the condition should not be performed.

Looking at the whole of the will, the construction which I give to it is this: that the testatrix, having made these legacies and bequests, and being doubtful whether her personal estate would be sufficient to satisfy them, says to the person to whom she gives her estate, real and personal, "I expect, as a matter of conscience and equity, and as part of the terms upon which I devise to you this estate, that you will within a given time satisfy the legacies and bequests one way or other; and if you fail to do so, although I do not propose to take the estate out of you, and to make your default a cause of forfeiture, yet I impose upon you the obligation in conscience and equity because I charge the estate with them, and give you the estate subject to that charge." The result is, that there is an absolute devise to the defendant, subject only to the trust to pay these legacies; and then, if the trust is good as to some and bad as to others, he will have to perform those which are capable of being properly carried out; and as to the residue he will be, in law and equity, discharged.

We have the authority of Lord St. Leonards, the highest, perhaps, of the present day with regard to the law of real property, for saying that the tendency in modern times has been, to depart from the strict interpretation adopted in earlier periods of our law when these matters were considered only with reference to common law; and that, where the language of the will and the intention of the testator admit of it, these devises "upon condition" are to be considered as imposing

a trust, and not as conditions which shall take the estate out of the devisee if he does not comply with them. 1 Sugden on Powers, 7th ed., 122. Now all the objects this testatrix had in view, with the exception of that which the law does not allow, will be fully carried out, with the intervention if necessary of a Court of equity, by treating this as a trust, instead of a common law condition. To construe it to be a condition operating as a forfeiture in the case of non-compliance [253] would *displace the devisee, by whom the testatrix evidently intended that her testamentary intentions should be carried out, and let in the heir-at-law whom she never contemplated. Giving effect to that more liberal and enlarged doctrine laid down by Lord St. Leonards, in his great work on Powers, no forfeiture has been worked in this case, and upon this point our judgment must be in favour of the defendant.

The other grounds of the rule were disposed of by the observations made by the Bench in the course of the argument.

CROMPTON, J.—I am of the same opinion. The real question in this case is on the meaning of the word "condition." I believe it has never been considered as a word of technical inflexible signification, like the terms "heirs of the body," "heirs male," and "heirs." It was properly treated by Mr. Terrell as a flexible word, which may have different meanings; and it is constantly used in legal matters in a less strict sense, as, when we speak of conditions of sale and conditions in agreements, we mean terms of sale and terms in agreements. Then are we bound to treat the word "condition" in this will in the strict technical sense in which it was used in Lord Coke's time, as working a forfeiture if it was not performed, defeating one estate and raising another. I think that the rule is well laid down by Lord St. Leonards, with regard to estates upon condition, "that what by the old law was deemed a devise *upon condition* would now, perhaps, in almost every case, be construed a devise in fee upon trust." And he adds, "By this construction, instead of the heir taking advantage of [254] the condition broken, the cestui que trust *can compel an ob-servance of the trust, by a suit in equity:" 1 Sugd. Pow. 122, 7th ed. And the passage is cited in 2 Jarman on Wills 7, note (c), 2d ed., apparently without the slightest doubt as to its being good law. When there is a limitation over, the estate must be destroyed; but in this will there is no limitation over, and the question is, whether, by the use of the word "condition," the estate given to the devisee is to be destroyed, so that the heir-at-law is let in. I think this was not the intention of the testatrix.

The Lord Chief Justice has mentioned many reasons leading to this conclusion, in which I agree. The testatrix devises all her estates to the defendant, both freehold and copyhold, and all her personal estate and effects, upon an express condition. I do not see how this condition could apply to the personality, because only the residue of the personal estate, after paying the debts and legacies, would go to the defendant. It is difficult to say that there should be a forfeiture of the residue after these were paid, and very difficult to give the words, "upon this express condition," different meanings in this will when applied to the real and to the personal estate respectively. And when we find that the testatrix expresses her confidence that the devisee, as

a man of honour and conscience, would pay the legacies, her intention, as gathered from the will, is strong to show that the defendant was to take the estate absolutely, and was not to forfeit it. The next reason is derived from the charge on the real and personal estates. At one time I was inclined to think that this part of the will might be construed to mean, "Even if this condition is broken, I charge the estate in the hands of my heir, or to whomsoever it shall come." But, on consideration, I am clearly of opinion *that it is an immediate charge,—that is, a charge on the estate in the hands of the [*255 devisee. It is clear that the testatrix charges all her real estate with the payment of the legacies and bequests during the year after her decease. Then, construing this as a condition in the strict sense of the word, how could the charge or trust be performed? If the devisee converted the real estate into money, for the purpose of paying the legacies, how could he give a good title to the purchaser? If he has only a defeasible estate he cannot convey more than that defeasible estate; and the heir-at-law might enter and turn out the purchaser.

From these considerations, and looking to the whole will, I feel satisfied that the testatrix could never have intended that the estate should be forfeited at the end of the year, so that the whole should pass to the heir-at-law, and all the duties attached to it under the will should devolve upon him.

Mr. Terrell argued that, if this was not a condition, it did not follow that it must necessarily be a trust. I hold it to be a trust, though I do not know that it matters whether it is called a trust or a charge. But that raises the question whether, if one part of the charge or trust is bad, the other is necessarily bad. Mr. Terrell failed to show any authority for the proposition that, because one trust or charge among several in a will is bad, the rest of the will is to be destroyed. In *Doe d. Burdett v. Wright*, 2 B. & A. 710, the devise was wholly for an illegal purpose; and in such a case the legal estate does not pass; but, when there is a devise both for legal and illegal purposes, the devisee takes the estate quoad the legal purposes, subject to the trust. If the bequests to the servants Jane Burton and Sarah Burton, and that class of *bequests, are good, it seems to me that it [*256 would be monstrous to depart from the principle on which *Young v. Grove*, 4 C. B. 668 (E. C. L. R. vol. 56), and *Doe d. Chidgey v. Harris*, 16 M. & W. 517, were decided.

As to the ground of the rule that there was an illegal contract between the testatrix and the defendant to defeat the Statute of Mortmain; if there had been any fraud the will could not have been supported by the jury, and I can see no evidence of any contract that makes this will illegal. If there was any such evidence, it would only show that although some parts of the will are illegal, some parts are good; and to support these latter the devise to the defendant must be upheld.

BLACKBURN, J.—I am of the same opinion. I agree with the Lord Chief Justice and my brother Crompton, that the only real question is, whether there is a condition which, upon the legacies not being paid within a year from the death of the testatrix, entitles the heir-at-law to enter and take possession of the estate; that is entirely a

question of construction of the will. Persons may, in their wills, create any condition, provided it be not contrary to the policy of the law, if they use proper words to show that such is their intention. The question in every case is, what is the intention of the testator? No doubt in the time of Lord Coke the word "condition" was more strictly construed; it is laid down in Co. Litt. 236 a, b, "And here is to be observed, that many words in a will do make a condition in law, that make no condition in a deed: as here to devise lands to an executor ad vendendum, so if lands be devised to one ad solvendum 20l. to I. S. or paying 20l. to I. N. *this amounts to a condition." *257] And then he refers to Crickmer's Case, Co. Litt. 236 b,(a) which was that of a man seised of certain lands, having issue two daughters, and devising all his lands to one of them and her heirs, she to pay a certain sum of money to the other, and it was held that the words "to pay" did amount in a will to a condition; and, as Lord Coke states, the reason was, that otherwise the legatee would be remidleas. It was therefore necessary, in his opinion, to construe the words as amounting to a condition in law, for the purpose of carrying out the intention of the testator. But since Lord Coke's time that reason has ceased to exist. From the greatly extended jurisdiction of the Courts of equity, and the mode in which estates are administered in equity,—so far from its being for the advancement of the interests and the protection of the rights of the legatee, the person whose benefit is intended, that such words should be construed as a strict condition at law, which is to be taken advantage of by the heir-at-law,—it would be to his advantage to construe them as meaning that the devisee should take the estate upon the terms that it shall be subject to the obligation that he will fulfil the condition; in other words, that he shall take the estate as trustee for that purpose. And accordingly, it being the policy of the law to carry out the general intention of the testator, such words are held not to make a condition, but to create a trust, as is laid down by Lord St. Leonards in his able work on Powers.

Then, looking at the whole of this will, I see nothing to show that it was the intention of the testatrix to prescribe the inconvenient instead of the convenient mode of carrying out her object. The word "condition" is often used to signify "terms;" and there is much to *show that the testatrix used the word in this sense. In the first place, all the residue of her personal estate and effects—that is, after having paid the legacies—is bequeathed to the defendant "upon this express condition." As far as regards the personal estate, to use the word "condition" in the sense of a condition at law—which would prevent the defendant taking that property unless the legacies were paid—would be absolutely insensible, for the legacies must be paid by the executor before the residue of the personal estate could be handed over to the defendant. Then why should we read the words "upon this express condition" as meaning "upon these express terms," with regard to the personal estate, and as having a different meaning when applied to the real estate? There is another reason, pointed out by Mr. Hall in his able argument. If the defendant took the estate charged with the bequests, he was bound, whether it is a condition or

whether it is a trust, to pay the legacies within twelve months from the death of the testatrix, and he could not know till the end of that time whether the personal estate was insufficient or not; and it would be very hard if it were to be treated as a strict condition at law, on the non-fulfilment of which he was to be turned out, when he could not know, till the very moment when the condition was necessarily broken, whether there was a necessity to fulfil that condition. Moreover, as has been already said by the Lord Chief Justice and my brother Crompton, it being necessary, for the purpose of discharging these legacies within the twelve months, to raise the money, it clearly was intended that the defendant, during that time, should have the power to raise the money by mortgage or sale of the land; and, if this was to be treated as a condition at law, the *defendant having only a defeasible estate, the purchaser could not have [*259] a good title without going to a court of equity, which the testatrix never could have intended. Mr. Hall drew the true conclusion—that this is to be treated as Lord St. Leonards points out in his work, to which reference has so often been made, not as a devise upon a condition in law, but as a devise upon trust.

As to another point raised on this part of the rule, it is too clear for argument, especially after the case of *Grove v. Young*, 4 C. B. 668 (E. C. L. R. vol. 56), which I think is right, and if not right, being expressly in point, we could not overrule.

As to the other grounds of the rule, I agree with my Lord and my brother Crompton.

Rule discharged.(a)

(a) The report of the arguments and judgments in this case have been compiled partly from the note book of the late T. F. Ellis, Esq.

IN THE EXCHEQUER CHAMBER.

WRIGHT v. WILKIN. Feb. 8.

For head-note, see ante, p. 232.

THE plaintiff having appealed from the above decision, the case was argued in this Vacation.

Feb. 1. *Mellish*, for the plaintiff.—The reason why the limitation of an estate or condition in a will which, in Lord Coke's time, would have been construed literally as a *condition, *Crickmer's Case*, [*260] Co. Litt. 236 b.,(a) is, in modern times, construed as a trust, is that the Courts of law now recognise the fact that the Court of Chancery will enforce the trust for the party interested. But that reason does not apply to this case. The Court of Chancery would not enforce payment of the legacies to charitable purposes contrary to the Mortmain Act; and therefore this limitation may be construed as a condition at common law. The legatees will not be prejudiced by this construction, because there is a separate charge of the real estate with payment of the legacies, so that though the heir-at-law enters for breach of the condition, he will take the estate, subject to the legacies,

(a) *S. C. Crockmore v. Patterson*, 1 Leon. 174.

as much as the devisee took it subject to them. The desire of the testatrix to secure the payment of her legacies to charities is the key to the will, and that object will be promoted by holding this to be a devise on condition. Knowing that she could not effectually charge her real estate with those legacies, she devises it to the defendant, an attorney, who, by her instructions, drew her will. And she tries to effect her object in several distinct ways:—first, she makes a direct bequest of the legacies; secondly, she charges them on her estate real and personal; thirdly, she uses prayers and entreaties to her devisee to pay them; fourthly, she makes the payment of them within twelve months a common law condition, saying to the devisee, “If you will pay all my legacies within twelve months from my decease you shall have all my estate.” And in order to secure payment of them within that time she imposes the penalty of the devisee losing the estates if he make default. Further, the testatrix intended her executors, *261] *and not the devisee, to execute the trusts of her will, so far as they legally could be carried out. At the beginning of her will she mentions her executors, and they are to make a good title. There is no power to sell the land except that which makes the executors trustees to sell it; there is no trust distinct from the duty of the executors except the trust to pay the legacies out of the real estate; and the will contains the ordinary clauses for their protection as trustees. *Doe d. Jones v. Hughes*, 6 Exch. 228, decided that a simple charge of an estate with payment of debts and legacies did not give a legal power to sell, but only a power to go into Chancery to compel performance; though, in *Robinson v. Lowater*, 17 Beav. 592,(a) it was held in equity that, the executor being the person who would have to apply the fund, he took by implication a power to sell the estate. Again, if this devise be construed as a devise on trust for the payment of legacies to charities, it would be void; but treated as a common law condition, it is not contrary to the Mortmain Act. The test is whether the devise gives to the trustees of a charity, in any event, the power of proceeding against the land. If it does it is void, as contrary to the Mortmain Act; *Jeffries v. Alexander*, 8 H. L. Ca 594, in which the House of Lords overruled the Lords Justices and the majority of the Judges; but if it is treated as a common law condition, it merely amounts to saying to the defendant, “If you will choose out of your own property to pay all my legacies you shall have my land.” In 2 Jarman on Wills I, the doctrine of a condition at common law is stated as in existence: “No precise form of words is necessary, in order to create conditions in wills; any expressions disclosing the intention will have *that effect.” In the 2d and *262] 3d editions of that work the editors, Wolstenholme and Vincent, have inserted, between brackets, in note (c) to p. 7, the passage from 1 Sugden on Powers 122, 7th ed., 106, pl. 15, 8th ed., and therefore it has not the authority of Mr. Jarman. In *Egerton v. Earl Brownlow*, 4 H. L. Ca. 1, 207–8, Lord St. Leonards recognises that there may still be a common law condition. *Doe d. Gill v. Pearson*, 6 East 173, is an instance of a common law condition in force; where Lord Ellenborough, in delivering the judgment of the Court, said, p. 181, “These cases show that the devise in question may operate as a

(a) S. C. on appeal, 5 De G. M. & G. 272.

devise on condition; for the breach of which, in levying a fine to the uses within stated, the heirs-at-law of the devisor will be entitled to enter."

Feb. 8. *O'Malley*, for the defendant.—If this is a condition, a Court of equity would relieve the devisee from forfeiture upon payment of the valid legacies; for a Court of equity will always relieve against condition broken unless its interference would affect the rights or interests of third parties or the party in remainder. The distinction is that, where there is a gift over, the Court will not interfere, but where there is a condition which would enable the heir to enter, the Court will relieve against the breach of the condition: *Salmon v. Vaux*, Tothill 105; *Wallis v. Grimes*, 1 Cas. in Chanc. 89; *Underwood v. Swain*, 1 Rep. in Chanc. 161, 1st ed., 85, 3d ed.; *Barnardiston v. Fane*, 2 Vern. 366; *Grimston v. Lord Bruce*, 1 Salk. 156. Since the case of *Grimston v. Lord Bruce*, 1 Salk. 156, in Q. Aune's time, there is no case in the books of a recovery in ejectment, *nor of a bill for relief in equity, for a condition of this kind broken, which [*263 shows that Lord St. Leonards was not without authority for his statement, that what used to be construed a devise upon condition would now be construed a devise in fee upon trust. [POLLOCK, C. B.—As the law does not favour conditions and other forfeitures, it is not surprising that the doctrine on this matter should have settled down into that stated by Lord St. Leonards.] The Court of Chancery would enforce performance of the condition as a personal obligation on the devisee. The condition is looked upon as a stipulation which binds the party who takes the estate, so that, if the estate is insufficient to pay the legacies, the devisee is liable: *Earl of Northumberland v. Earl of Aylsford*, Amb. 540; *Messenger v. Andrews*, 4 Russ. 478. *Doe d. Gill v. Pearson*, 6 East 173, was a case in which there was no remedy in equity, and the condition was such that the enforcing it would give the estate to the parties who would recover in law or equity, unless the fine levied in breach of the condition frustrated the intention of the testator. If this is construed as a condition, the object of the testatrix to benefit the charities might be defeated by a connivance between the devisee and the heir, who alone could take advantage of a breach of the condition. The testatrix could not have intended that if the devisee were prevented from paying the legacies within twelve months by a suit brought by the heir disputing the will, all the property should go to him, who would not be bound in honour to regard her wishes. She intended the legacies to be paid out of his personal property by the person to whom she devised the real estate, placing reliance on his personal honour. As to the charitable bequests which the Court of Chancery *would not enforce, [*264 there is no other means of carrying them out.

Looking at the codicils, it is clear that the testatrix did not intend to die intestate as to any part of her property real or personal. In the second codicil there is a devise of after-purchased land without condition; and as the testatrix gives that to her devisee absolutely, appending it to the property in her will, she cannot have intended that the devise in her will should be upon a strict condition at law, and so the property in her will go to the heir for condition broken.

Mellish, in reply.—The cases which decide that relief against forfeiture would be given in equity are decisions that at law the heir can recover for condition broken. *Poor v. Mial, Madd. & Geld.* 32, was a bequest of leasehold estate for which the heir could not enter. There is no case which supports the alleged change in the law, where, as in this will, there are express words importing a condition.

ERLE, C. J.—This is a case of considerable difficulty. There is a doubt in the minds of some members of the Court; in the minds of others there is no doubt. Upon the whole, however, we are all of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

Speaking for myself, and I believe for some of my brethren, I may say that, if we discovered from the will that it was the intention of the testatrix that there should be a forfeiture of the estate by the devisee in the event of the legacies not being paid, it would be our duty to give effect to that intention; but we fail to discover with judicial certainty that such was the intention of the testatrix.

*POLLOCK, C. B.—I entirely agree with the Lord Chief Justice. I do not think that the will sufficiently shows us that the condition was intended to operate so as to produce a forfeiture; and, therefore, we should follow the current of recent decisions.

WILLIAMS, J.—I cannot see on the face of the will sufficient to bring my mind to the conclusion that the testatrix intended that the non-payment of the legacies should operate as a forfeiture. As to the passage in 1 Sugden on Powers, p. 122, 7th ed., 106, pl. 15, 8th ed., I think all that Lord St. Leonards meant to say was, that the remedy given in a Court of equity for carrying out the intention of a testator was one which in old times the Courts of law could not regard. Those Courts thought themselves restrained from looking upon the proceedings in a Court of equity as a remedy, and therefore held particular words in a will to constitute a condition, on the ground that, if they did not, there would be no remedy. That reason has long since ceased, and, therefore, a different view is taken as to whether particular words constitute a condition. But I do not think that all words which would formerly have been looked on as creating conditions are now to be treated as trusts, but that this can be done only where the Court of Chancery can more conveniently give effect to the wish expressed than a Court of law. Looking at the language of this will altogether, I think we are more likely to effectuate the intention of the testatrix by construing it as a trust than as a condition.

CHANNELL, B.—I am entirely of the same opinion.

KEATING, J., concurred.

Judgment affirmed.

*The GREAT INDIAN PENINSULA RAILWAY COM.
PANY v. SAUNDERS. Feb. 8. [*266]

Marine insurance.—Particular average.—Partial loss.—Expense of forwarding goods.

1. Where goods are insured by a policy of marine insurance in the ordinary form, the expression "warranted free from particular average" is not confined to losses arising from injury to, or deterioration of, the goods themselves; but is equivalent to a stipulation against total loss and general average only; and, consequently, includes expenses incurred in relation to the goods.

2. A quantity of iron rails was shipped to be carried to a certain place, for a sum to be paid there, ship lost or not lost. The shippers insured them by a policy in the ordinary form "warranted free from particular average, unless the ship be stranded, sunk or burnt;" with the usual clause authorizing the assured to "sue, labour and travel for, in, and about, the defence, safeguard and recovery of the goods." The ship was neither stranded, sunk nor burnt; but there was a constructive total loss of her by perils of the sea. The rails were saved, and sent on in other vessels to their destination, for which the assured was compelled to pay freight to an amount not exceeding the value of the rails. Held, that this freight was not recoverable under the policy.

ERROR having been brought on the judgment of the Queen's Bench for the defendant (see vol. 1, p. 41), the case was argued, on the 3d and 8th February; before Erie, C. J., Pollock, C. B., Keating, J., and Channell and Wilde, BB.; and judgment delivered on the latter day.

Edward James (R. E. Turner with him), for the plaintiffs.—The plaintiffs are entitled to recover from the defendant the money expended by them, after the loss of the ship, in forwarding the insured goods to their destination. The Court below decided in favour of the defendant, on the grounds, first, that, as there had been no total loss of the goods, the case was one, not of general average, but of particular average, and, as such, excepted by express provision in the policy; and, secondly, that, for the same reason—namely, there having been no total loss of the goods—the case did not come within the clause authorizing the assured to "sue, labour *and travel for, in, and about, the defence, safeguard and recovery" of the goods, to [*267] the charges of which the assurers undertook to contribute.

It is true that here was no actual loss of the goods, nor constructive loss either, seeing that the additional expense incurred in forwarding them did not equal their value: *Rosetto v. Gurney*, 11 C. B. 176 (E. C. L. R. vol. 73). But it is a rule that, in construing a contract, the whole must be looked at, and a reasonable construction put upon it. In *Blackett v. The Royal Exchange Insurance Company*, 2 C. & J. 244, 251, also, Lord Lyndhurst, delivering the judgment of the Court, says, "The rule of construction as to exceptions is, that they are to be taken most strongly against the party for whose benefit they are introduced. The words in which they are expressed are considered as his words, and if he do not use words clearly to express his meaning, he is the person who ought to be the sufferer." Consequently clauses like the present, in a policy of insurance, which are introduced for the protection of the underwriter, are to be looked on as expressed in his own words, and be construed most strongly against him. Applying these principles here, the true construction of this policy is, that the underwriter undertakes, not only that he will indemnify the assured against total loss of the goods during the transit, but that if in consequence of the perils insured against, any

money is necessarily expended by the assured in bringing the goods to their destination, he will repay it. [James here stated that a similar construction has always been put at Lloyds on the common memorandum in marine policies, which is in the same language as that in the body of the policy in this case; and that, where goods have met with accidents like the present, the practice of average staters is *268] never to add "to the account of the assured the expense incurred in landing, warehousing and drying, so as to bring the loss up to 3*l.* or 5*l.* per cent., as the case may be.] Under the circumstances it was for the assured to decide whether he would abandon the goods. [POLLOCK, C. B., referred to the language of Lord Ellenborough in *Anderson v. Wallis*, 2 Mau. & S. 240, 247, that "Disappointment of arrival is a new head of abandonment in insurance law."]

The Court below founded their judgment in a great degree on Arnould on Insurance, vol. 2, p. 970, § 358, 2d ed., where particular average loss is said to be "loss arising from damage accidentally and proximately caused by the perils insured against, or from extraordinary expenditures necessarily incurred for the sole benefit of some particular interest, as of the ship alone or the cargo alone," and also p. 875, § 322; and on Phillips on Insurance, vol. 2, p. 183, § 1422, 3d ed., where he defines particular average to be "a loss borne wholly by the party upon whose property it takes place, and is so called in distinction from a general average, for which different parties contribute," and p. 452, § 1767, where he says that an insurance against total loss only and an insurance with the exception of particular average, are equivalent forms. But the expression "average" is used in insurance law in different senses, from which much confusion has arisen. In *Wilson v. Smith*, 3 Burr. 1550, 1555, Lord Mansfield says, "Policies of insurance, according to their present form, are very irregular and confused: an *ambiguity* arises in them from their using words in *different* senses; particularly in the use of this word *average*." In *Burnett v. Kensington*, 7 T. R. 210, 225, Lawrence, J., says: "Now *269] considering how extremely inaccurate a policy of *insurance is penned, I think that too great stress ought not to be laid on the precise words used in it." In *Le Cheminant v. Pearson*, 4 Taunt 367, 380, Mansfield, C. J., delivering the judgment of the Court, says: "This policy of insurance is a very strange instrument, as we all know and feel; in practice I know of cases in the Court of King's Bench, where such expenses have been recovered as an average loss, without making any distinction whether it was recoverable as an average loss from damage repaired, or within the words of the permission to 'sue, labour, and travail, &c.'; and as no such distinction has been made, we find it safer to adhere to the practice which has obtained and to call it all average damage." In the present case, the judgment of the Court below proceeded on the ground that "particular average" and "partial loss" are synonymous terms, and opposed to total loss. It is true that "particular average" is often used in the sense of "partial loss," but it is often, and in this case among others, used in a different sense, as meaning deterioration of the goods by the perils insured against. There are many authorities to this effect. Benecke on Marine Insurance 472, Lond., 1824, says: "The term *particular*

average, as understood at Lloyds, does not comprise the *particular charges*, or the expenses incurred for saving or preserving the cargo or freight, such as warehouse-rent in an intermediate port, which is considered a particular charge on the cargo, and expenses of reloading, which is made a particular charge on the freight. These charges, however small they may be, are paid by the underwriter independent of the particular usage. Hence it is clear that they cannot be *added* to the particular average, for the purpose of ascertaining whether this amounts to 5 or 3 per cent., and that the underwriter is not [*270] liable, unless *the particular average by itself amount to the stipulated per centage.—For the same reason, general and particular average cannot be added to make the underwriter liable if they jointly amount to 3 per cent." And, at p. 380, he has language to the same effect. Emériton, *Traité des Assurances*, tom. 1, ch. 12, sect. 39, p. 584, ed. by Boulay-Paty, 1827, gives the following definition from Targa, c. 60, p. 255: "L'avarie é damno, quale ô per tormenta di mare, ô per altro accidente fatale ha origine, e occorre ô in la nave ô in le merci in quella existante, e in l'una, e l'altra anchora." And the following from Pothier, *Des Assurances*, no. 115: "On appelle *avarie*, dont les assureurs sont tenus, tous les dommages causés *par quelque accident de force majeure* aux choses assurées, quoiqu'il n'ait pas causé la perte totale; et toutes les dépenses extraordinaires auxquelles *quelque accident de force majeure* a donné lieu, par rapport aux choses assurées." Again, Emériton, c. 12, s. 16, p. 426, cites art. 9 of the Declaration of 1799: and adds the following, "Dans les cas où les dites marchandises auraient été chargées dans un nouveau navire, les assureurs courront les risques sur les dites marchandises jusqu'à leur débarquement dans le lieu de leur destination, et seront en outre tenus de supporter, à la charge des assurés, les avaries des marchandises, les frais de sauvetage, de chargement, magasinage et rembarquement, ensemble les droits qui pourraient avoir été payés, *et le surcroit de fret, s'il y en a.*" And Boulay-Paty, in a note on this passage, says, "On entend par *surcroit de fret* ce qu'on paie de plus pour le transport depuis le lieu du désastre jusqu'à celui de la destination, relativement au premier fret stipulé." Arnould on Insurance, vol. 2, pp. 1126-7, § 398, 2d ed., refers to Barker *v.* Blakes, 9 East 283, and says, [*271] "This *case, in fact, shows what Lord Ellenborough stated to be the true doctrine on another occasion, 'that a total loss of the cargo may be effected by a total permanent incapacity in the ship to perform the voyage, for that is a destruction of the contemplated adventure,' Anderson *v.* Wallis, 2 Mau. & S. 240, 246." In Thompson *v.* The Royal Exchange Assurance Company, 16 East 214, 215, Bayley, J., says, "The very object of the exception is to free the underwriters from liability for damaged goods. They say in effect that they will be liable if the goods are wholly lost, but not if they are only damaged." And in Livie *v.* Janson, 12 East 648, 655, Lord Ellenborough says, "There may be cases in which, though a prior damage be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss. Actual disbursements for repairs in fact made, in consequence of injuries by perils of the seas prior to the happening of the total loss, are of this description; unless indeed they

are more properly to be considered as covered by that authority, with which the assured is generally invested by the policy, of 'suing, labouring and travailing, &c., for, in, and about the defence, safeguard, and recovery of the property insured,' in which case the amount of such disbursements might more properly be recovered as money paid for the underwriters under the direction and allowance of this provision of the policy, than as a substantive average loss to be added cumulatively to the total loss which is afterwards incurred in consequence of the sea risks." In *Duff v. Mackenzie*, 26 L. J. C. P. 313, 316, 3 C. B. N. S. 16, 29 (E. C. L. R. vol. 91), Williams, J., in delivering the judgment of the Court, says, "Although it is stipulated [He also referred to 2 Arnould, Insurance, 322 § 875, 324 § 885, and 357 § 967.] *by the warranty that these effects shall be free of all average, —or, in other words, that the insurer shall not be liable for any amount of sea damage to them short of a total loss,—we think, looking at the nature of the subject of insurance and the terms of this exemption, it is doing no violence to the language used to hold that he is not to be exempted from liability for a total loss of any of the articles of which the 'effects' consist." The form of the declaration in *Powell v. Gudgeon*, 5 Mau. & S. 431, also, although the judgment proceeded on another point, supports this construction. The American case of *Mumford v. The Commercial Insurance Company*, 5 Johns. (U. S.) Rep. 262, is an authority in point for the plaintiffs. [He also referred to 2 Arnould, Insurance, 322 § 875, 324 § 885, and 357 § 967.] If these goods had been sent on to their destination by the captain instead of the assured, he could recover the excess of the charge for carrying them above the amount of the bill of lading: *Shipton v. Thornton*, 9 A. & E. 314, 335. [WILDE, B.—That point is not there decided. What you refer to is only a doubt thrown out. *Everth v. Smith*, 2 Mau. & S. 278, and *M'Carthy v. Abel*, 5 East 388, seem against you.] At least the plaintiffs are entitled to recover the difference between the expense incurred in sending on the goods and the sum paid for their carriage in the first instance.

Honyman, who appeared for the defendant, was not called on.

ERLE, C. J.—I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

This is an insurance on goods "warranted free from particular average,"—in effect an insurance against a total *loss. According to the statement before us the facts are these. The carriage of the goods was prepaid, amounting to 629*l.* 9*s.* 10*d.*; the ship sailed, and, having been damaged, was taken into an intermediate port under circumstances which constituted a constructive total loss of the ship; but the cargo was landed and delivered to the plaintiffs who were the owners of it, and by them taken to its destination in a state undamaged by sea in any way. After the happening of this misfortune to the ship, the plaintiffs paid 825*l.* 11*s.* 7*d.* more for the new voyage; and they now seek to recover this latter sum, or the difference between the two sums, from the insurer; and the question is, are they entitled to do so?

It is certain that the plaintiffs cannot recover here as for a total loss of the goods, seeing that the goods were restored to them in specie, and forwarded by them to their place of destination, where, so far as

any sea damage is concerned, they may have received full value for them.

But Mr. James ably argues that the plaintiffs are entitled to recover this money ; not as compensation for loss of the goods within the general language of the policy ; but as the expense of forwarding them to their destination in other vessels, under what has been called "the labour and travel clause," which empowers the assured to sue, labour, and travel to save the thing assured from impending loss. The substantial ground, however, on which I decide this case is entirely beside his able argument. The expenses that can be recovered under the suing, labouring, and travelling clause are expenses incurred to prevent impending loss within the meaning of the policy. Now, here, the goods were given up to the plaintiffs in perfect safety ; and the question is, were these expenses incurred to prevent a total loss ? Had the owners a right *when the goods were given into their possession to turn the transaction into a total loss ? Certainly [*274 not, for they had the goods in specie, and consequently that 825*l.* 11*s.* 7*d.* had no reference to suing, labouring, or travelling in order to prevent such a loss.

A great part of Mr. James's argument turned on the different meanings of the word "average." If it were necessary to go into that point, I should clearly be of opinion that the words found in an instrument in common use should be taken according to the ordinary understanding of them when so used. It is agreed that "particular average" has two meanings, universally understood—that when taken with reference to the common memorandum clause it excludes certain expenses, but when taken with reference to the money to be paid by the underwriter it includes them. In Arnold on Insurance, vol. 2, 970, sect. 358, 2d ed., it is said that such expenses as these are to be included. But all this is beside the question now before us, as these expenses have nothing to do with the labour and travel clause. I also think that it should make no difference in our judgment whether the freight was prepaid or to be earned.

For these reasons, and also those given in the Court below, which are quite satisfactory to my mind, and where the difference between this case and the American case of Mumford *v.* The Commercial Insurance Company, 5 Johns. U. S. Rep. 262, is clearly pointed out, I am of opinion that the defendant is entitled to our judgment.

POLLOCK, C. B., KEATING, J., and CHANNELL and WILDE, BB., concurred.
Judgment affirmed.

Where the owner of goods excepts from the risk against which he insures, a loss which may arise from particular average, he cannot charge the underwriter with the extra freight which he has paid in order to forward the goods to their destination. Such freight constitutes particular average, and is included in his warranty. Nor can the increased expenditure be recovered under the labour clause, as that is limited to disbursements made for the purpose of rescuing the property from an impending total loss, which is the peril insured against. So long as the goods were not endangered, the expenses were not incurred for the benefit of the underwriter, and cannot be imposed upon him. This was the principal case ; where iron rails,

shipped at London for Bombay, were warranted by the insured to be free from particular average. The ship being disabled, put into Plymouth. The rails were forwarded by other vessels, and the question was presented for decision, whether the underwriter or the owner was liable for the freight which had been paid in order to forward the rails to their destination. It was decided that the underwriter was not bound to reimburse the owner for the extra freight. So in *Booth v. Gair*, 15 C. B. N. S. 291, a cargo of bacon was insured free from particular average from New York to Liverpool. The ship, suffering from the heavy weather which she had encountered, put into Bermuda, where she was abandoned. The action was for the extra freight, transhipment, warehousing, and surveying, which were the disbursements made in order to forward the cargo to its destination. The court refused to charge the underwriters with the additional expenses, because they were incurred in order to avert a loss, the risk of which had not been taken by them, but had been assumed by the insured himself.

Where the warranty against particular average is not general, but under a certain percentage, the expenditure incurred to avert a loss, which would, were it not for this outlay, exceed the limit of the warranty, must be borne by the underwriter.

In *Kidston v. The Empire Marine Ins. Co.*, L. R. 1 C. P. 535, there was an insurance on freight. The ship left the Chincha Islands, loaded with guano. She was severely injured by storms in going round Cape Horn, and took refuge in Rio, where she was abandoned. The insured received from the charterers the stipulated freight, and brought an action to compel the underwriters to reimburse them for the expenses of transhipment and forwarding the cargo to Liverpool.

In delivering judgment for the plaintiffs, Mr. Justice Willes states the reasons which influenced the court to charge the underwriters with this liability: "Without incurring them (the expenses of forwarding) the subject-matter of the insurance never would have had any complete existence. They were incurred in order to earn it; and they represented so much labour beyond and besides the ordinary labour of the voyage, rendered necessary for the salvation of the subject-matter of insurance, by reason of a damage and loss within the scope of the policy, the immediate effect of which was that the subject-matter insured would also be lost, or rather would never come into existence, unless such labour was bestowed. As the goods lay at Rio, no part of the chartered freight had accrued due, and no freight even *pro rata itineris* could have been claimed by the ship-owner." In answer to the argument that the expenditure under the labour clause should be limited to cases of abandonment, he said: "If an occasion should occur in which by reason of a peril insured against, unusual labour and expense are rendered necessary to prevent a loss for which the underwriters would be answerable, and such labour and expense is incurred accordingly, the underwriters will contribute, not as a part of the sum insured in case of loss or damage, because it may be that a loss or damage for which they would be liable is averted by the labour bestowed, but as a contribution on their part as persons who have avoided detriment by the result in proportion to what they would have had to pay if such detriment had come to a head for want of timely care. Take, for instance, the case of a policy on goods warranted free of average under 5 per cent., and the goods are wetted in a storm which drives the ship into a port of distress

when by drying at an expense less than 5 per cent. the goods might be saved or damaged under 5 per cent., whilst if not dried, they would decay and become damaged over 5 per cent., though existing in specie, so that freight would be payable. In this case there is no abandonment, and may be no prospect of one; and yet it is the duty of the master to use all reasonable means to preserve the goods, and obviously for the interest of the underwriters to encourage him in the performance of that duty by contributing to the expense incurred. Not only the generality of the words, but also the subject-matter to which they relate, therefore, point to the application of the claim to all cases in which the underwriter is saved from liability and loss, whether partial or total, and whether an abandonment does or may possibly take place or not." The argument that particular average included contribution to expense incurred in preserving the thing insured as well as loss of or damage to it, and excludes application of the labour clause, is thus answered: "If this be so, it must equally be true of all memorandum goods which are warranted free from average under a certain percentage, and the operation of this would be so general, if not universal, that the suing and labouring clause would be confined to the cases excepted in the memorandum alone. Two results would follow, both novel in practice and one at least very remarkable. * * Thus, in the case already put, of goods wetted by a storm, the amount of expenses reasonably incurred in preserving the goods is, according to the present practice, contributed to under the suing and labouring clause, however small in the result be the loss or damage to the goods; and the loss of or damage to the goods is paid if it amount to the stipulated percentage, but not otherwise, and the amount of expenses is not added in

order to make up that percentage. Thus, if the agreed percentage be 5 per cent., and the expenses amount to 2 per cent., and the loss or damage be 3 per cent. only, the expenses are paid, and not the average. But, if we hold that the warranty excludes the application of the suing and labouring clause, the whole must be paid, and the underwriters will be exposed to the very inconvenience which the memorandum has been supposed to obviate.

"Upon the other hand, if the expenses should be less than the percentage, and a loss is thereby prevented either altogether or to an extent less than the percentage; as if in the case put, the expenses were 3 per cent. and the damage only 1 per cent., according to the present practice the underwriters would pay the expenses; but, if we decide for the present defendants, the underwriters, though saved from loss, would be altogether exempt from contribution."

Alexandre v. Sun Mutual Ins. Co., 49 Barb. (N. Y. 1867) 475.

The distinction which separates the principal case from *Kidston v. Empire Marine Ins. Co.*, lies in the subject-matter of the insurance. In *The Great Indian Penin. R. v. Saunders*, the goods were insured, but anything less than a total loss was excepted from the risk. Unless the goods were exposed to a peril which threatened their total destruction, the underwriters were not interested in their rescue and transportation. In the *Kidston v. Empire Marine Ins. Co.* case, however, the freight was insured, and this would under the English decisions be totally lost unless the goods were forwarded to their destination. The underwriters were accordingly interested in seeing that means were taken to forward the goods and earn the freight. The disbursements which were made in order to effect this result should be shared among those who derived a benefit from the salvage.

*^{275]} *The Churchwardens and Overseers of FAVERSHAM. Appellants, The Guardians of the ISLE OF THANET Union, Respondents. Feb. 13.

Pauper lunatic in asylum.—Order of settlement and maintenance.—16 & 17 Vict. c. 97, ss. 67, 97, 132.

1. A justice of a borough not having a quarter sessions has no jurisdiction, under sect. 67 of stat. 16 & 17 Vict. c. 97, to send a pauper lunatic to an asylum; and this by reason of the meaning assigned to the word "borough" by the interpretation clause, sect. 132.

2. The jurisdiction of justices under sect. 97 of that Act to adjudge the settlement of a pauper lunatic and make an order for his maintenance, attaches where he is *de facto* confined in an asylum; and their order is not invalidated by the fact that he was sent there by a justice who had no jurisdiction: (per Wightman and Mellor, J.J.; Crompton, J., dissentient.)

CASE stated under stat. 12 & 13 Vict. c. 45, s. 11.

This was an appeal against an order of G. C. Norton, Esq., one of Her Majesty's justices of the peace for the county of Surrey, and one of the Magistrates of the Police Courts of the metropolis, bearing date the 13th April, 1860, adjudicating the settlement of Sarah Martin, a lunatic, to be in the parish of Faversham, in the county of Kent, and ordering the guardians of the poor of the Faversham Union to pay, on account of the said parish, certain expenses incurred in and about the examination and conveyance of the said Sarah Martin, and also for the expenses of her maintenance.

The order of G. C. Norton, Esq., contained the following recitals. "Whereas, by a certain order of David Price, Esq., one of her Majesty's justices of the peace in and for the borough of Margate, in the county of Kent, heretofore made and now proved before me the undersigned, one of Her Majesty's justices of the peace *in and for ^{*276]} the county of Surrey, and being also one of the Magistrates of the Police Courts of the metropolis, sitting at the Lambeth Police Court, in the said county of Surrey, and within the Metropolitan Police district, and within whose jurisdiction the licensed house for the reception of lunatics hereinafter mentioned, and in which one Sarah Martin, a pauper lunatic, is now confined, is situate, bearing date the 12th July last past, and directed to the superintendent or proprietors of the Camberwell House Lunatic Asylum, being a licensed house for the reception of lunatics, situate at Camberwell, in the said county of Surrey; after reciting that he the said David Price had called to his assistance a surgeon, and had personally examined the said Sarah Martin, and was satisfied that the Sarah Martin was a lunatic, and a proper person to be taken charge of and detained under care and treatment, it was by the said David Price ordered that the said superintendent or proprietors should receive the said Sarah Martin as a patient into his asylum; and subjoined to which said order was a statement respecting the said Sarah Martin, as required by the statute in such case made and provided. And, whereas it is now proved to me the said undersigned magistrate, upon oath, that before and at the time of the making of the said order the said Sarah Martin was chargeable to the parish of St. John the Baptist, in the Isle of Thanet Poor Law Union, in the said county of Kent; and that, by virtue of the said order, the said Sarah Martin was, on the said 12th July last past, conveyed from the said parish of St. John the Baptist to the said

licensed house, and was there received by the superintendent or proprietors thereof as a patient by virtue of the said order, and that she hath since been *and still is confined there as a lunatic, at the expense of the said parish of St. John the Baptist." The order then recited a complaint by the guardians of the Isle of Thanet Union, on behalf of the parish of St. John the Baptist, of the chargeability of the lunatic to that parish, and adjudged that the place of the last legal settlement of the lunatic was in the parish of Faversham: and ordered the guardians of the Faversham Union to pay, on account of the parish of Faversham, to the guardians of the Isle of Thanet Union, certain sums, being respectively the expenses incurred in and about the examination of the lunatic, and in bringing her before the said justice, and in and about conveying her to the asylum, and the charges for her maintenance in the asylum for twelve months next before the date of the order; and a certain sum weekly for the future maintenance of the lunatic in the asylum.

The order of David Price was as follows. "I, David Price, the undersigned, having called to my assistance a surgeon, and having personally examined Sarah Martin, a pauper, and being satisfied that the said Sarah Martin is a person of unsound mind, and a proper person to be taken charge of and detained under care and treatment, there being no available accommodation in the County Asylum, hereby direct you to receive the said Sarah Martin as a patient into your house."

"Subjoined is a statement respecting the said Sarah Martin.

"(Signed) DAVID PRICE, a justice of the peace
"for the borough of Margate.

"Dated the 12th day of July, 1859."

"To J. H. Paul, M. D., Medical Superintendent
"of Camberwell House Asylum."

David Price had, upon his own knowledge, and without *any notice being given to him by the relieving or other officer of the parish of St. John the Baptist, examined the lunatic at the house where she was residing, and after calling to his assistance a surgeon, made the order of the 12th July, 1859.

Under this order the pauper lunatic was conveyed from the parish of St. John the Baptist, Margate, to the said licensed house by the relieving officer of such parish. At the times the orders of David Price and G. C. Norton, Esquires, dated respectively the 12th July, 1859, and 18th April, 1860, were made, the pauper lunatic was a proper person to be confined in the said licensed house under the provisions of the 16 & 17 Vict. c. 97, s. 67, and it was admitted that such lunatic was properly sent there, and that all the proceedings for sending her there were regular, with the exception hereinafter mentioned.

The settlement of the lunatic is in the parish of Faversham, and the only ground of appeal against the said order was, that at the time of the making of the order by David Price, Esq., for the removal of Sarah Martin, the borough of Margate was not a borough town or city corporate, having a quarter sessions, recorder, and clerk of the peace, within the meaning of the provisions of the 132d section of the 16 & 17 Vict. c. 97, "An Act to consolidate and amend the laws for the provision and regulation of lunatic asylums for counties and boroughs, and for

the maintenance and care of pauper lunatics, in England ;" and consequently that David Price had no jurisdiction to make that order.

At the time of the making of the order by David Price, the borough of Margate was a borough created by charter of the Crown, dated the 29th July, 1857, under the Municipal Corporations Act, and David *279] Price *had been appointed, and was at the time of making the order, a justice of the peace of the borough ; but at the time of making the order by David Price no court of quarter sessions had been or was created or established for the borough, nor had any recorder or clerk of the peace for the borough been appointed, nor was there then in fact any recorder or clerk of the peace for the borough.

The parish of St. John the Baptist, in which the borough of Margate is wholly situate, is not part of the county of Kent, but is a non-corporate limb and ancient member and liberty of the borough town and port of Dover, and still remains so, except so far as it is affected by the charter of incorporation before mentioned. Besides the justices appointed for the borough of Margate under the charter of incorporation, certain justices appointed under stat. 51 G. 3, c. 36, and the justices of Dover assigned to that place by virtue of the Municipal Corporations Act, 5 & 6 W. 4, c. 76, s. 135, continue and have jurisdiction in Margate under that Act, and under 18 & 19 Vict. c. 48, and 20 & 21 Vict. c. 1.

David Price is only a justice for the borough of Margate, appointed under the charter incorporating that place, and is not a justice for the borough, town and port of Dover, nor is he appointed under stat. 51 G. 3, c. 36.

Dover is one of the Cinque Ports, and has a separate court of quarter sessions of the peace, recorder and clerk of the peace, and it was contended by the respondents that Margate is still within the jurisdiction of such court, by virtue of stats. 5 & 6 W. 4, c. 76, s. 134, and 6 & 7 W. 4, c. 105, s. 10.

*280] It was contended, on behalf of the churchwardens and seers of the poor of the parish of Faversham, that David Price had no jurisdiction to make the order for the reception of the lunatic into the said licensed house, and that, her confinement and chargeability there being unlawful, the order of G. C. Norton, dated 13th April, 1861, was therefore void.

It was contended, on behalf of the parish of St. John the Baptist, Margate, that David Price had jurisdiction to make the said order, and that, whether he had or not, the order of G. C. Norton was rightly made, because, at the time of the making the same, the pauper lunatic was confined in the said licensed house at the cost and charge of the parish of St. John the Baptist.

The question for the opinion of the Court is, Whether David Price had jurisdiction to make the order dated 12th July, 1859 ; and whether, if he had not, the order of G. C. Norton is thereby rendered invalid.

If the Court should be of opinion that the order of G. C. Norton is, under the circumstances above stated, properly made, then such order is to be confirmed ; otherwise the same, or so much thereof as this Court should think illegal, is to be quashed.

Poland, for the respondents.—First, the order for the reception of the lunatic into the asylum was rightly made. Mr. Price had juris-

diction to make that order under stat. 16 & 17 Vict. c. 97, s. 67. The enacting part gives jurisdiction to a justice of the county or borough within which the parish from which the lunatic was sent is situate; but the proviso is, "That it shall be lawful for any justice, upon notice being given to him as aforesaid, or upon his own knowledge, without any such notice as aforesaid, to examine any pauper deemed to be lunatic *at his own abode or elsewhere, and to proceed in all respects as if such pauper were brought before him in pursuance of an order for that purpose." [CROMPTON, J.—That is a proviso on the enacting part; it must mean that the justice should be a "justice of the county or borough in which such parish is situate."] If that is so, the justice who has jurisdiction under the enacting part must be a justice of a borough having a quarter sessions, recorder and clerk of the peace, because, by sect. 182, "Borough" shall mean every borough, town and city corporate having a quarter sessions, recorder, and clerk of the peace." But Margate, though an outlying district, is an ancient member and liberty of the borough of Dover, which is one of the Cinque Ports, and has a quarter sessions, recorder, and clerk of the peace. Sect. 67 means that the justice of the borough shall act when the place is liable to the jurisdiction of a borough quarter sessions; and Margate is a borough within the jurisdiction of the quarter sessions of the borough of Dover. It is as if Margate was part of Dover; the justices of Dover have jurisdiction in Margate; and all the prisoners committed by the justices of Margate are sent to be tried at the quarter sessions at Dover. [CROMPTON, J.—There is a separate set of justices and a separate commission of the peace for Margate. WIGHTMAN, J.—The commission in which Mr. Price's name is does not extend to Dover, and therefore he is not a justice of a borough within sect. 67, as explained by the interpretation clause: CROMPTON, J.—Margate is a sub-borough with a minor jurisdiction. The interpretation clause is very express as to the meaning of the word "borough" in the statute, unless there be something in the subject or context repugnant to such *construction; and there is nothing in sect. 67 repugnant to the construction assigned to the word by the interpretation clause. The Dover justices have jurisdiction over Margate: the borough of which Mr. Price is a justice has no quarter sessions, and therefore he is not within sect. 67.] Then, the justices of the county having no jurisdiction in Margate, the justices of Dover must go to Margate in order to remove dangerous lunatics.

Secondly, supposing the order for receiving the lunatic into the asylum was invalid, there was sufficient to give jurisdiction to make the order of settlement and maintenance under stat. 16 & 17 Vict. c. 97, s. 97. By that section, "It shall be lawful for any two justices for the county or borough in which any asylum, registered hospital, or licensed house in which any pauper lunatic is or has been confined is situate," to inquire into and adjudge the settlement of the pauper lunatic and to make an order of maintenance. Only two ingredients are necessary to give jurisdiction, viz., that the person should be a pauper lunatic, and that he should actually be in confinement; and the Court will not inquire whether the proceedings under which he was confined are legal or not. In *Reg. v. The Inhabitants*

of Crediton, E. B. & E. 231 (E. C. L. R. vol. 96), orders of adjudication and maintenance, made under sect. 97, recited an order of justices by which the pauper lunatic was duly sent to the asylum, and had been confined there "as such pauper lunatic," and still remained there; and it was held that the jurisdiction of the justices to make the orders of adjudication and maintenance sufficiently appeared; and Erle, J., said, p. 242, "I think that, when an order, in itself apparently regular, refers by recital to a former order, we should, in absence of proof to the contrary, infer that the recited order was good, though, no doubt, this removing order, as recited, is exceedingly loose. I think, moreover, that there is a great deal in what Mr. Coleridge and Mr. Phear urged as to the jurisdiction to make the orders of adjudication and maintenance attaching by the fact of the lunatic being in the asylum." [CROMPTON, J.—There the magistrates had jurisdiction over the subject-matter, but it was objected that the asylum was not shown to be that to which, by sect. 72, the pauper lunatic ought to have been sent.] Reg. v. The Guardians of the Carnarvon and Anglesea Union, 3 N. S. C. 708,(a) was decided on stat. 8 & 9 Vict. c. 126, s. 58, which empowered justices to inquire into the settlement of a pauper lunatic "confined or ordered to be confined," which words might be construed "legally ordered to be confined," that is by a legal and valid order, whereas the words in sect. 97 of stat. 16 & 17 Vict. c. 97, are "is or has been confined." Erle, J., however, said, p. 713–714, "I am inclined to think that the jurisdiction of the justices to make an order of settlement and maintenance of a lunatic commences from their finding him 'confined or ordered to be confined' in an asylum. I think that it would be very salutary to take up the inquiry there, in an appeal against an order of maintenance, and so to preclude any investigation then into the validity of the order under which he was sent there." In that case the order did not state that there was no asylum in the county, or that it was full, without which the justices would have no authority to send the lunatic to an asylum out of the county. In Reg. v. The Inhabitants of *Minster, 14 Q. B. 349 *(b) (E. C. L. R. vol. 68), it was held no objection to an order of maintenance, under stat. 8 & 9 Vict. c. 126, that the lunatic was not stated to be chargeable to the parish whence he was removed, nor that the medical certificate did not state some of the particulars in the form given in the schedule to the statute. Erle, J., p. 357, expressed the opinion that the order of maintenance "was not invalidated by the absence of any formality in the steps which brought" the pauper lunatic into the asylum; and the judgment of the Court, p. 362, is to the effect that de facto confinement, if not unlawful, gives jurisdiction for adjudicating on the settlement, and making an order of maintenance. [CROMPTON, J.—In that case the person who sent the lunatic to the asylum had jurisdiction; but some of the forms directed by the statute were not complied with.] In stat. 16 & 17 Vict. c. 97, the jurisdiction is limited to the fact of the pauper lunatic being in the asylum. Suppose a lunatic who has strayed away from his dwelling place is found in a parish, and is taken by a police constable before a magistrate, who makes an order for his removal to an asylum, the relieving officer must execute the order and remove him to the asylum

(a) And see note (b) to Reg. v. The Inhabitants of Minster, 14 Q. B. 357 (E. C. L. R. vol. 68).

for the protection of the public. In the first instance, the burden of maintaining a pauper lunatic is on the parish where he is found; and the only mode by which that parish can relieve itself is by showing that he was sent to the asylum from it, and calling on the justices to inquire into the settlement and make an order upon the parish of settlement, upon which the burden of maintaining him ought to be thrown. [CROMPTON, J.—The parish in which the pauper lunatic is found wandering should take him before a *magistrate.] But in this case the parish has nothing to do with the matter. [*285] [CROMPTON, J.—We are now on the supposition that the person who sent the lunatic to the asylum was not a magistrate.] But is the relieving officer to decide whether the order is valid or not, in the case it may be of a dangerous lunatic? The justices have only jurisdiction to inquire into the place of the last legal settlement. [CROMPTON, J.—Suppose a lunatic has himself walked into an asylum.] In some cases, the officiating clergyman or the relieving officer may send a lunatic to an asylum; suppose the person officiating as clergyman was not ordained, or the relieving officer was not properly appointed; or suppose the medical officer who sent him had no diploma, or his diploma was not regular, is the parish into which the lunatic had strayed permanently to support him? It cannot fairly be contended that the parish officers ought to take care that the proceedings are regular, because they may not be the parties who institute them. And, under sect. 71, the relieving officer or overseer is liable to a penalty for refusing to execute, "with all reasonable expedition," an order for conveying a person to an asylum.

T. L. Wood, for the appellants.—[The Court desired him to confine his argument to the last point.] Sect. 97 of stat. 16 & 17 Vict. c. 97, assumes that the lunatic has been sent to the asylum under the provisions of one of the previous sections, beginning with sect. 67, by which certain persons have authority to send pauper lunatics to an asylum; and therefore the word "confined" must mean "lawfully confined." In *Regina v. The Inhabitants of Minster*, 14 Q. B. 349, 362 (E. C. L. R. vol. 68), Lord Campbell, in delivering the *judg- [*286] ment of the Court, said, "As the pauper lunatic was *de facto* confined, and as that confinement was not unlawful, the jurisdiction . . . attached;" and reference was made to several cases in which the Court had refused to discharge a lunatic on account of defects in the certificate for confinement. This is not like those cases, nor like *Reg. v. The Guardians of the Carnarvon and Anglesea Union*, 3 N. S. C. 708, (a) in which there was a fault in the order under which the lunatic was sent to the asylum, as recited in the order adjudging the settlement. It is of the essence of sect. 97 that the justice who sends the lunatic to the asylum should have jurisdiction. [WIGHTMAN, J.—There may be a distinction between the case of a lunatic sent to the asylum by a person who appears to fill the office of a justice and the case of a lunatic sent by a person who does not appear to do so.] In *Reg. v. The Inhabitants of Crediton*, E. B. & E. 231 (E. C. L. R. vol. 96), the objection being to the order sending the lunatic to the asylum, as recited in the order adjudging the settlement, it was held that, in absence of proof to the contrary, the jurisdiction of the justice who

(a) And see note (b) to *Reg. v. The Inhabitants of Minster*, 14 Q. B. 357 (E. C. L. R. vol. 68).

made the recited order sufficiently appeared; here the contrary is shown. In *Reg. v. The Inhabitants of Rhyddlan*, 14 Q. B. 327 (E. C. L. R. vol. 68), it was held that a preliminary irregularity on the part of the relieving officer in taking the pauper lunatic before a justice did not affect his jurisdiction to make an order for confinement, nor the jurisdiction of justices to make an order of settlement and maintenance.

Poland, in reply.—It does not follow that the *confinement [287] of the lunatic in the asylum is illegal because she was not sent there by lawful authority. Suppose she was a dangerous lunatic, her detention would be legal. *Ex parte Greenwood*, 1 Jur. N. S. 522, 524, (a) coram Coleridge, J. [CROMPTON, J.—Here the confinement of the pauper lunatic was illegal during the time in respect of which the respondents ask for the expenses of past maintenance.]

WIGHTMAN, J.—It appears that Sarah Martin, being in the parish of St. John the Baptist, in the Isle of Thanet Union, was a pauper lunatic chargeable to that parish; that an application was made to a magistrate of the borough of Margate for her removal to a lunatic asylum, and by an order of that magistrate she was removed to the Camberwell Asylum. The parish of St. John the Baptist having, in the first instance, paid the expenses of her removal and the subsequent expenses of her maintenance in the asylum, application was made to a metropolitan Police Magistrate, within whose jurisdiction the asylum in which the pauper lunatic was confined is situate, to inquire into and adjudge her place of settlement, in order that it might be charged with her future maintenance, and that the parish of St. John the Baptist might be recouped the expenses to which it had been put. And, the magistrate having adjudged the appellant parish to be the parish of settlement, the objection taken by that parish is that the authority under which the pauper lunatic was sent to the asylum was defective, inasmuch as the magistrate of the borough of Margate, though within the terms of sect. 67 of stat. 16 & 17 Vict. c. 97, had no jurisdiction, [288] because, by the interpretation *clause, sect. 132, the word "borough" means a borough having a quarter sessions, and Margate has not a quarter sessions. The parish officer who took the pauper lunatic before the Margate justice omitted to look at the interpretation clause, and so failed to make this discovery; and therefore it is said that, the confinement of the pauper lunatic in the asylum being unlawful, the order of settlement and maintenance is void. It appears to me that it was for the very purpose of avoiding such questions as these that sect. 97 was framed in the terms in which we find it; because nothing could be more inconvenient, or, if I may use the term, absurd, than that such questions should be agitated on the application for an order adjudging the settlement. It is clear that the parish of settlement ought to bear these expenses. It is also clear that the pauper lunatic ought to have been removed to the asylum, and there is no question that she was chargeable in the first instance to the parish of St. John the Baptist; and the only question is, whether she ought to have been sent to the asylum by an order of a justice of Margate. Sect. 97 enacts that it shall be lawful for any two justices for the county or borough in which any asylum "in which any pauper

(a) *S. C. Reg. v. Pinder, In re Greenwood*, 24 L. J. Q. B. 148, 152.

lunatic is or has been confined is situate" to inquire into and adjudge the last legal settlement of such pauper lunatic, and order payment of the expenses and maintenance. By the Act for regulating the metropolitan Police Courts, 2 & 3 Vict. c. 71, s. 14, under which Mr. Norton acts as a metropolitan Police Magistrate, he has all the powers given by sect. 97 to two justices; but it is said that, although by the terms of that section it is lawful for him to inquire into the last legal settlement of a pauper lunatic confined in an asylum, without stating in terms that it is necessary for *him to inquire further, yet he [*289] is to inquire whether the lunatic was lawfully confined. It seems to me that the object of this part of the section was to give him jurisdiction only to inquire into the settlement; and I adopt the view stated by Erle, J., in *Reg. v. The Guardians of the Carnarvon and Anglesea Union*, 3 N. S. C. 708, 713-714, (a) "That the jurisdiction of the justices to make an order of settlement and maintenance of a pauper lunatic commences from their finding him 'confined, or ordered to be confined' in an asylum." Every motive of convenience would lead to such an enactment. Therefore, the justice of the case, except so far as the strict objection goes, would require such an order as that in question to be made, which is founded on an order purporting to be an order of a magistrate for the confinement of the lunatic in the asylum, without inquiring into the jurisdiction of the magistrate to make that order. I am therefore of opinion that our judgment ought to be for the respondents.

CROMPTON, J.—I am not satisfied with the conclusion at which my brother Wightman has arrived, and in which I believe my brother Mellor concurs. We must look at the order as if it had been made without authority by a private individual, for it is conceded that Mr. Price, though a justice of Margate, had no jurisdiction to make it. Therefore we have to decide on the general proposition whether sect. 97 of stat. 16 & 17 Vict. c. 97, relates to any other pauper lunatic than one confined by order of a justice or other person having authority to make such order; and I cannot say that I agree with the view of my brother *Wightman that the difficulty of ascertaining [*290] the jurisdiction to make the order which must arise in every particular case can affect our decision. The Act of Parliament has not made any provision for such a case; probably the hardship of it did not occur to the Legislature. In order to arrive at the meaning of sect. 97 we must in this case compare it with sect. 67, which gives jurisdiction to a justice to order any pauper deemed to be a lunatic to be brought before him to be examined, and, if found to be lunatic, to order him to be conveyed to an asylum. Sect. 97 must be construed with reference to that and other sections, which give to certain persons therein named authority to send pauper lunatics to an asylum. Giving full effect to the generality of the words at the beginning of the 97th section, they do not satisfy me that the section was intended to include the case of pauper lunatics sent to the asylum by an unauthorized person. The section must be read as if the words were "is or has been confined under the former section," that is, by lawful authority. Besides, the justices are to order the overseers of the parish in which the pauper lunatic is settled to pay all expenses (a) And see note (8) to *Reg. v. The Inhabitants of Minster*, 14 Q. B. 357 (E. C. L. R. vol. 68).

incurred in and about his examination, "and the bringing him before a justice or justices," and his conveyance to the asylum. It seems to me a question of great doubt whether sect. 97 could be meant to apply to any expenses except those incurred when the pauper lunatic had been brought before the proper authority, and had been legally sent to an asylum.

The cases cited are reconcilable with this view. In Reg. v. The Guardians of the Carnarvon and Anglesea Union, 3 N. S. C. 708,(a) [*291] it was decided that the order under which the *lunatic was sent to the asylum was not to be presumed to be bad from the recital of it in the order of settlement and maintenance, inasmuch as it was not necessary that the latter order should set out all that appeared in the original order. In Reg. v. Ryddlan, 14 Q. B. 327, 339 (E. C. L. R. vol. 68), Erle, J., expressly says, "I think that, in the present case, there should, at all events, be a presumption of jurisdiction until the contrary appears." He also thought that the provisions of the 48th section of stat. 8 & 9 Vict. c. 126, as to the mode of bringing the lunatic before the magistrates, were directory only. I agree with him in both those opinions. Though the original order is not good as recited, it may be presumed to be right when the acts done under it have been adopted by the parish; and the cases of Reg. v. The Guardians of the Carnarvon and Anglesea Union, 3 N. S. C. 708, 713-714,(a) and Reg. v. The Inhabitants of Crediton, E. B. & E. 231, 242 (E. C. L. R. vol. 96), in which Erle, J., enunciated the proposition which has been referred to, are within the distinction that the provisions as to bringing the pauper lunatic before the justice and his conveyance to the asylum are directory only. But Lord Campbell, in delivering the judgment of the Court in Reg. v. The Inhabitants of Minster, 14 Q. B. 349, 362 (E. C. L. R. vol. 68), points to the right view when he says, "As the pauper lunatic was *de facto* confined, and as that confinement was not unlawful, the jurisdiction for adjudicating on the settlement under sect. 58, and for making an order for maintenance under sect. 62, attached, sect. 58 applying to all cases of pauper lunatics confined or ordered to be confined in an asylum, and [*292] sect. 62 applying in all cases *of pauper lunatics sent to an asylum when the settlement shall have been adjudged under sect. 58."

The justices, when they adjudicate on the settlement, ought to take care that a proper order for sending the pauper lunatic to the asylum has been made, because there is no appeal against that order, and they have jurisdiction to decide whether it is valid or invalid. We are now put in the place of the quarter sessions, and we are to see whether Mr. Norton had authority to make the order by which the appellants are fixed with the future maintenance of the pauper lunatic. One question for the decision of the quarter sessions would be, whether the pauper lunatic was properly sent to the asylum, and it is clear that he was not, as the person who took upon himself to act in sending him was a mere stranger.

MELLOR, J.—With deference to the opinion of my brother Crompton, it appears to me that the reasonable construction of the 97th section of stat. 16 & 17 Vict. c. 97, is that which my brother Wightman has

(a) And see note (b) to Reg. v. The Inhabitants of Minster, 14 Q. B. 357 (E. C. L. R. vol. 68).

given to it; and I cannot help thinking that enormous inconveniences would arise from any other construction. I think that the words of the section, "is or has been confined," were advisedly used. They differ from the words of sect. 95, "when any pauper lunatic is confined under the provisions of this act," and give jurisdiction to the justices to adjudge the settlement of the pauper lunatic, and make an order of maintenance under the following conditions, viz., that the person shall be a pauper lunatic brought from the complaining parish and chargeable to it, and that he should be in confinement, and settled in the parish on which the order is made. All these conditions, which go to the merits of the order, are stated as existing in ^[#293] this case; and I think that it would be inconvenient that the justices should go on to inquire into the foundation of the jurisdiction under which the pauper lunatic was confined.

The opinion of Erle, J., in *Reg. v. The Guardians of the Carnarvon and Anglesea Union*, 3 N. S. C. 708, 713-714, (a) goes to the point before us; and the language of Lord Campbell, in the later case of *Reg. v. The Inhabitants of Crediton*, E. B. & E. 281, 241 (E. C. L. R. vol. 96), shows that he was of opinion that the jurisdiction to adjudge the settlement attached on the fact of the pauper lunatic being in the asylum. One of the objections was the same as that made to-day, and he said, "It appears to me . . . that none of the objections made are sustainable," and Erle, J., adhered to the opinion which he had before expressed, in *Reg. v. The Guardians of the Carnarvon and Anglesea Union*, 3 N. S. C. 708, 713-714, (a) as to the construction of the previous Act, 8 & 9 Vict. c. 126, viz., that the two main facts which give jurisdiction to make the order of settlement and maintenance are, the pauper lunatic being confined in the asylum and being settled in the parish on which the order is made.

On these grounds I am of opinion that our judgment ought to be for the respondents. Judgment for the respondents.

(a) And see note (b) to *Reg. v. The Inhabitants of Minster*, 14 Q. B. 357 (E. C. L. R. vol. 68).

***The QUEEN v. The Inhabitants of CHIDDINGSTONE.** [#294]
Feb. 13.

Poor law audit.—Reopening accounts.—Pauper lunatic.

In 1854, a pauper lunatic was sent to an asylum at the charge of the parish of C., in which she had acquired the status of irremovability. Her maintenance was charged to C., and allowed in the half-yearly audits until Michaelmas, 1860, when the overseer of C. objected that they ought to be charged to the common fund of the Union to which C. belonged. The auditor disallowed the costs for the six months ending Michaelmas, 1860, against the parish, and transferred them to the common Union fund account, but refused to reopen the accounts previously audited. On motion to vary the allowance, brought up by certiorari under stat. 7 & 8 Vict. c. 101, s. 35, by crediting the parish of C. with the sums paid in previous years and debiting the common fund of the Union with those sums: held, that the auditor did right in not reopening the accounts previously audited.

IN Easter Term, 1861,

Barrow obtained a rule, on behalf of the inhabitant ratepayers of the parish of Chiddington, in the county of Kent, calling upon G. M. Arnold, Esq., Auditor of the West Kent Audit District, to show

cause why the allowance made by him, on the 7th December, 1860, in the accounts of the Sevenoaks Union for the half year ending Michaelmas Day, 1860, should not be varied by crediting the parish of Chiddington with 150*l.* 18*s.* 4*d.*, and debiting the common fund of the said Union with the same sum.

The auditor's certificate, which had been removed by certiorari under stat. 7 & 8 Vict. c. 101, s. 35, was as follows: "I hereby certify that, in the accounts for the half year ending Michaelmas Day, 1860, contained in the general and parochial ledgers of and belonging to the board of guardians of the Sevenoaks Union, I have *disallowed the sum of 11*l.* 17*s.* 8*d.*, charged therein against the parish of Chiddington, for and in respect of the maintenance of Jane Medhurst, a lunatic; and I have transferred the said charge of 11*l.* 17*s.* 8*d.* to the debit of the common fund account, entered in the said general ledger, and subject to the said disallowance I have allowed the said account in all other respects.

" My reasons for the above disallowance are as follow: that Jane Medhurst, a pauper lunatic, was, in 1854, sent to the Kent County Lunatic Asylum, at the charge of the parish of Chiddington, from which parish she was then irremovable from length of residence, her settlement being elsewhere. Her maintenance continued to be charged by the lunatic asylum to the said parish; and the guardians of the Union, who paid the same, also charged such payments in like manner to the said parish in their half-yearly accounts from that period up to the present time. The steward of the said asylum refused an application to transfer the charge for the maintenance of the lunatic to the guardians of the Union, in respect of their common fund, without an order of justices, under 'The Lunatic Asylums Act, 1853,' 16 & 17 Vict. c. 97.

" Two justices, on the 28th of April, 1858, made an order, which was prepared for signature (but not actually signed till two years later), ordering the payment of 3*l.*, the expenses of the pauper's examination, and 100*l.* 6*s.* 8*d.*, the accumulated amount of her maintenance, &c., at the asylum, from the 10th March, 1854 (when the lunatic was sent to the asylum), to that date, to be paid out of the common fund; and this order was considered to be authorized by the 102d section of the said Act. The order also similarly provided for the payment of the future maintenance.

*" The total amount of maintenance, from the period of the *296] pauper being sent to the asylum up to the end of the Lady Day half year 1860, is 150*l.* 18*s.* 4*d.*; the further cost of maintenance for the half year ending Michaelmas, 1860, included in the accounts now under audit by me, is the said sum of 11*l.* 17*s.* 8*d.*

" The overseers of the parish of Chiddington, as ratepayers of that parish and otherwise, requested me, by their solicitor, to disallow the accumulated charge of 162*l.* 16*s.*, as entered in the Union ledgers against the said parish, and, in lieu thereof, to charge the whole of such sum against the common fund account.

" The clerk to the guardians, while admitting that the parish of Chiddington was equitably entitled to relief, contended that sect. 102 of the said Act was controlled by sect. 97, and that the justices could

order the payment of the costs of the twelve previous calendar months' maintenance only.

"Having heard what was alleged on both sides, I have made the certificate of disallowance and allowance as above, and my reason for so much of the same as relates to the said disallowance is that, under the said order of justices of the 28th April, 1858, the maintenance of the said lunatic for the half year ending Michaelmas, 1860, ought to have been charged by the guardians of the said Union upon the common fund of the said Union, and not against the said parish: and for the said allowance, that I have no power by law as auditor to reopen the accounts of the several half years previous to the accounts of the half year, to wit, the half year ending Michaelmas, 1860, now under my examination, the said accounts of the said previous half years having been long since by me examined, audited and closed, and my functions of auditor in regard thereto having become terminated and discharged. Witness my hand, this 7th day of December, 1860."

"G. M. ARNOLD."

The parish of Chiddingstone, in the county of Kent, is comprised in the Sevenoaks Union, which Union is within the West Kent Audit District.

F. Russell showed cause.—First, the duty of the auditor at the time of making the certificate was confined to auditing the accounts for the half year immediately preceding Michaelmas, 1860, and he had no power to examine into the propriety of charges made in the accounts of previous half years.

Secondly, if he had a discretion as to opening the accounts of previous half years, he exercised it rightly in refusing to do so; because the parish officers and ratepayers of Chiddingstone had knowledge, or means of knowledge, during the previous half years in which the pauper lunatic was chargeable, that the charge of maintaining her was, under stat. 16 & 17 Vict. c. 97, s. 102, debited to the account of their parish by the guardians of the Sevenoaks Union, instead of to the common fund of the Union; and it was the duty of the overseers and ratepayers of Chiddingstone to have objected, at the audit of each half year's account, to any improper charge made against them.—The Court then called upon

Barrow, to support the rule.—It was the object of stat. 16 & 17 Vict. c. 97, to make the same regulations with respect to the settlement of pauper lunatics as had previously prevailed with respect to ordinary paupers. Sect. 97 empowers two justices "at any time to inquire into the last legal settlement" of a pauper lunatic in an asylum, "and to make an order of settlement and maintenance; limiting the recovery of the expenses of past maintenance to those incurred within twelve months previous to the date of the order: but there is no limitation in sect. 102, which provides "that all the expenses incurred since the 29th September, 1853, or hereafter to be incurred," in and about the maintenance of a pauper lunatic in an asylum, "who would, at the time of his being conveyed to such asylum, have been exempt from removal to the parish of his settlement" by reason of stat. 9 & 10 Vict. c. 66, shall be charged to the common fund of the Union. In *Knowles v. Trafford*, in error, 7 E. & B. 144, 152 (E. C. L. R. vol. 90), an order of justices was made under sect.

102; but no order was necessary, for the officers of the Union were bound to obey that section without an order. [CROMPTON, J.—That case only decides that an order on the parish for payment of the maintenance of a pauper lunatic who was irremovable, made previously to stat. 16 & 17 Vict. c. 97, was annulled by that statute; here the parish have paid without an order. If no order was necessary, there could be no appeal, and the auditor would have to look into and decide the matter, instead of the justices.] It is no answer that there has been a previous audit in which these charges have been passed. The parish of Chiddington did not know until 1858, that the pauper lunatic had acquired the status of irremovability. [WIGHTMAN, J.—It was rather for the parish of Chiddington than for the guardians of the Union to know that fact. One audit having gone by might not preclude the auditor from reopening accounts previously audited; but here there have been several.] By the 48th article of *299] the General Order for Accounts, issued by the Poor *Law Commissioners 17th March, 1847, (a) "The clerk shall, at all reasonable times, at the request of any owner of property or rate-payer in the Union, permit him to inspect the statements of the Union or parish accounts for the twelve months prior to the last audit," which shows that accounts may be re-examined after an audit.

PER CURIAM (WIGHTMAN, CROMPTON and MELLOR, JJ.)

Rule discharged.

(a) See General Orders of the Poor Law Commissioners, by Lumley, p. 61. Consolidated and other Orders of the Poor Law Commissioners and the Poor Law Board, by Glen, p. 338.

PARKER, Appellant, v. GREEN, Respondent. Feb. 14.

Evidence.—Competency of witness.—9 G. 4, c. 61.—Persons of notoriously bad character.—Prostitutes.

On the hearing of an information before two justices of the peace, preferred under the 9 G. 4, c. 61, against a person licensed to sell excisable liquors by retail, for that he did "unlawfully and knowingly permit and suffer persons of notoriously bad character to assemble and meet together in his house and premises" held,

1. That the defendant was not a competent witness.
2. It having been proved that on the occasion in question a number of prostitutes (fourteen at the least) assembled and met together at the house of the defendant, that it was admissible evidence against him that on a previous occasion several of the same prostitutes assembled and met together at his house.
3. Prostitutes, as such, are "persons of notoriously bad character" within the meaning of the license.

CASE stated under the 20 & 21 Vict. c. 43, s. 2. Some portions of it having no reference to the questions argued before the Court are omitted.

At a petty session of the peace, holden at the Guildhall of the borough of Plymouth, on the 16th May, 1861, *an information preferred by Thomas Green, an inspector of police for the said borough (hereinafter called the respondent), against John Parker (hereinafter called the appellant), under sect. 21 of the Act of 9 G. 4, c. 61, charging for that he the said John Parker, on the 18th of May 1861, at the borough aforesaid, being then and there a person duly

licensed to sell excisable liquors by retail under and by virtue of the Act of Parliament in that behalf, in his house and premises there situate did then and there, to wit, on the said 13th May, unlawfully and knowingly permit and suffer divers persons of notoriously bad character to assemble and meet together in his said house and premises, so licensed as aforesaid, against the tenor of his said license, and contrary to the form of the statute in such case made and provided, came on for hearing before us, the undersigned, William Luscombe, Esq., Mayor, and David Derry, Esq., being two justices of, and acting for, the said borough of Plymouth, the parties respectively being then present with their respective attorneys, and the appellant having pleaded not guilty to the said information.

The case having stated that the hearing of the cause was adjourned to the 23d May, 1861, proceeded thus.—The said charge was accordingly duly heard and determined by us: and, upon such hearing, the appellant was duly convicted before us of the said offence, and we adjudged him guilty as of a first offence against the provisions of the said Act 9 G. 4, c. 61, relative to the maintenance of good order and rule, and to forfeit and pay the sum of 5*l*, to be paid and applied according to law, and also to pay to the respondent the sum of 16*s*, for the costs of such conviction: and if the said sums should not be paid *forthwith, we ordered that the same should be levied by distress and sale of the goods and chattels of the said appellant: and in default of payment and sufficient distress in that behalf we adjudged the said appellant to be imprisoned in the gaol at the borough of Plymouth aforesaid, for the space of one calendar month, unless the said several sums and all costs and charges of the said distress should be sooner paid. [*301

At the general annual licensing meeting of the justices of the peace of the borough of Plymouth, held at the Guildhall thereof, on the 5th of September, 1860, a license was granted to the appellant to authorize and empower him to keep an inn, ale house or victualling house, at the sign of the, &c., situate in, &c., in the said borough, which is one of the most public thoroughfares in the said borough; and by the said license (which is in the form prescribed by the said Act 9 G. 4, c. 61) it is provided (amongst other things) that the appellant "do not knowingly permit or suffer persons of notoriously bad character to assemble and meet together therein;" which license was to continue in force from the 10th October then next until the 10th October then next following.

The case then set out the evidence, by which it appeared that, on the occasion in question, 13th May, 1861, a large number of prostitutes were seen in the bar of the appellant's premises, who were acting in a disorderly manner, and proceeded thus.

The attorney for the respondent then put the following question to the witness: "did you ever see any of the women present on the night of the 13th instant in Mr. Parker's presence in the same bar at any other time?" *Whereupon the attorney for the appellant objected to the question, on the ground that there was a summons of a previous date for a similar offence, alleged on the 11th May, 1861, against the appellant; and his attorney placed the summons before the bench. Upon which, the attorney for the respondent stated

that he withdrew that summons (which in fact was, at the close of the present case, called on and dismissed without any evidence being offered by the respondent), and insisted on putting the question in order to show that the appellant knowingly permitted and suffered persons of notoriously bad character to assemble and meet together in his house. We thereupon overruled the objection taken by the appellant's attorney, on the ground that the question was relevant, as tending to show the guilty knowledge of the appellant. The witness then stated as follows, on the above question being repeated, "Yes, on the Saturday night before, and on other occasions before that, I mean Saturday the 11th instant. I mean by other occasions at other times within the last two months."

The attorney for the appellant addressed the bench on his behalf, and in the course of his address took the following objections, and contended:—

Second, that prostitutes were not persons of notoriously bad character within the meaning of the license granted to the appellant.

Third, that there was no evidence that they assembled and met, or were there for any other purpose than for refreshment.

Fifth, that evidence of what took place at the appellant's house on the 11th of May, or on any other previous occasion, was improperly received and ought to have been rejected.

*Sixth, the appellant's attorney proposed to produce and [303] examine the appellant, to explain how he conducted his business.

At the close of the address of appellant's attorney, he called the appellant and tendered him as a witness; we refused to receive the evidence of the appellant as being contrary to law, and on the grounds that he was incompetent as a witness, as he was liable, if convicted, to be fined, and in default of payment to be committed to prison.

No other evidence was adduced on the part of the appellant.

Having heard and considered the said case, we are of opinion, and find, that the appellant keeps the said victualling house under the license before stated.

We also find that, on the night in question, viz., 13th May, 1861, fourteen prostitutes at the least did assemble and meet together in the appellant's house, together with a number of men. We also find that the appellant knew the women were prostitutes, and that he knowingly permitted and suffered them to assemble and meet together in his house. We further find that the prostitutes remained in the appellant's house longer than was necessary for the purpose of taking refreshment, and that they assembled and met there for purposes connected with their vocation as prostitutes. And we are of opinion, and find, that they are persons of notoriously bad character within the meaning of the appellant's license.

We received the evidence that the same prostitutes, or some of them, who were at the appellant's house on the 13th May, had been [304] seen in his house on previous occasions, on the ground that it tended to prove the appellant's guilty knowledge of the bad character of the persons there on the night in question.

And lastly, we find the appellant was an incompetent witness, and

therefore we refused to receive his evidence on the ground before stated.

And hereupon we the said justices respectively request the judgment of the Court of Queen's Bench, whether our determination upon the facts and grounds previously stated is or is not erroneous in point of law, or what further should be done in the premises.

Welsby, for the respondent.—First, the received evidence was relevant. The conviction is under the 9 G. 4, c. 61, sect. 21 of which enacts, "Every person licensed under this Act, who shall be convicted before two justices, acting in and for the division or place in which shall be situate the house kept, or theretofore kept by such person, of any offence against the tenor of the license to him granted, shall, unless proof be adduced to the satisfaction of such justices, that such person had been theretofore convicted before two justices within the space of the three years next preceding of some offence against the tenor of the license subsisting at the time when such last mentioned offence was committed, be adjudged by such justices to be guilty of a first offence against the provisions of this Act relative to the maintenance of good order and rule, and to forfeit and pay any sum not exceeding 5*l.*, together with the costs of the conviction, &c.;" and the offence is against a clause in the appellant's license, which is according to Form C given by the schedule to the Act, that the *person whose house is licensed "do not knowingly permit or suffer persons of notoriously bad character to assemble and meet together therein." [CROMPTON, J.—*Reg. v. Oddy*, 2 Den. C. C. 264, seems against you. There, on an indictment for stealing and for receiving the property of A., knowing it to have been stolen, it was held, that evidence of possession by the accused of other property stolen from other persons was not admissible.] That case is distinguishable. Here the evidence was that the same, or some of the same, persons had assembled in the appellant's house on both occasions.

Secondly, the appellant was not a competent witness. In Cattell, appellant, Ireson, respondent, E. B. & E. 91 (E. C. L. R. vol. 96), it was held that an information, under the 1 & 2 W. 4, c. 32, s. 23, for using an engine for the purpose of taking game without a certificate is a criminal proceeding, and consequently that the party charged is an incompetent witness. (He was then stopped.)

H. C. Lopes, contrâ.—There is a point which has not been noticed by the other side. "Prostitutes" are not persons of "notoriously bad character," within the meaning of the condition in the license granted to the appellant under 9 G. 4, c. 61. Those expressions are not convertible terms, as appears from the language of several statutes where both are used: e. g. 23 & 24 Vict. c. 27, s. 32, 5 & 6 Vict. c. cvi. s. 251, upon which the case of *Greig v. Bendeno*, 27 L. J. M. C. 294, E. B. & E. 133, proceeded. The object of the condition in the license is to prevent the assembling by common design of thieves and similar characters in public-houses for the purpose of planning felonies. Prostitution, as such, is not an offence against society. [CROMPTON, J.—That raises another of the points made in the case,—that prostitutes shall not be prevented coming into a public-house for refreshment.] In any event it would be necessary to show that they behaved as prostitutes while there. [CROMPTON, J.—If I saw a gen-

tleman walking with a prostitute I should say he was walking with a person of notoriously bad character. WIGHTMAN, J.—We are against you on this.]

To proceed then to the two points argued by the other side. In the first place the evidence received was of a matter which took place some days before the occasion in question; and which, if true, might be made the subject of another information. [CROMPTON, J.—It has been held that that latter circumstance makes no difference. But here some of the *same* women had been in the appellant's house on a former occasion. WIGHTMAN, J.—That is evidence to show knowledge in the appellant.]

Lastly, the appellant was a competent witness. The 14 & 15 Vict. c. 99, s. 2, enacts that "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the person in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivā voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding." Sect. 3 *enacts: "But [§307] nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband." The words in this latter section, "any offence punishable on summary conviction," are to be read in conjunction with the preceding words, "in any criminal proceeding," which override the whole sentence. There are several kinds of summary convictions before justices of the peace which are not criminal, but civil proceedings, and where consequently the defendant is a competent witness—such, for instance, as proceedings in bastardy, and many forms of fiscal proceedings. In *The Attorney-General v. Radloff*, 10 Exch. 84, which was an information in the Exchequer for penalties under the Customs laws, Martin, B., says, p. 96, "It was argued that this is a criminal proceeding, wherein the defendant is charged with an offence punishable on summary conviction; and we are all agreed that the only question is, whether the information in the present case is a criminal proceeding within the true meaning of the 3d section. I think it is not. There are many *crimes* properly so called, which are liable to be punished on summary conviction. But [§308] there are a vast number of *acts* which in no sense are *crimes*, which are also so punishable; such, for instance, as keeping open public-houses after certain hours, and a variety of breaches of police regulations which will readily occur to the mind of any one." [CROMPTON, J.—*Cattell v. Ireson*, E. B. & E. 91 (E. C. L. R. vol. 96), was subsequent to that case. Besides, *The Attorney-General v. Rad-*

loff is no authority either way, as the Court were equally divided in opinion.] In Cattell v. Ireson the marginal note is not borne out by the judgment of Lord Campbell. In Legg, appellant, Pardoe, respondent, 9 C. B. N. S. 289 (E. C. L. R. vol. 99), Erle, C. J., says, p. 298, "I do not assent to the doctrine that all offences under the Act (1 & 2 W. 4, c. 32) are to be dealt with as criminal offences, because in one case it is provided that imprisonment with hard labour may be inflicted for non-payment of the penalty." A man imprisoned by a county court for non-payment of costs cannot be looked upon as a criminal. [CROMPTON, J.—That is a mere debt.] The information in this case was not for an offence against the law, but for infringing a condition on which a license was granted. Under sect. 21 of 9 G. 4, c. 61, the justices have no power to imprison the party convicted, and can only adjudge him to pay a sum by way of forfeiture, which may, if necessary, be enforced under sect. 25 by imprisonment, but without hard labour,—a distinction which is taken by Crompton, J., in Cattell, appellant, Ireson, respondent. [CROMPTON, J.—The same might be said of a common assault. There can be no difference for this purpose between sending to prison with or without hard labour. Do you mean to contend that the appellant here could have been examined as a witness for the prosecution?] Yes.

*Welsby was not called on to reply.

WIGHTMAN, J.—The Court is against the appellant on all [*309] the points which have been made. We have already expressed our opinion relative to the admissibility of the evidence which was received; and the only point on which any shadow of doubt can prevail is that last one, relative to the competency of the appellant as a witness. But, in truth, this is a criminal proceeding within the stat. 14 & 15 Vict. c. 99, s. 3. Looking at the 9 G. 4, c. 61, on which the conviction proceeded, it appears clearly to be treated as a criminal offence: for sect. 21 enacts, "Every person licensed under this Act, who shall be convicted before two justices, &c., of any offence against the tenor of the license to him granted, shall, unless, &c., be adjudged by such justices to be guilty of a first offence against the provisions of this Act relative to the maintenance of good order and rule;" and for that the punishment is, not imprisonment it is true, but a fine. And in the latter part of the same section it is provided that, on proof of certain facts, the party shall "be adjudged to be guilty of a third offence against the provisions of this Act;" and it also goes on to provide that the justices may, in their discretion, adjourn the case to the quarter sessions, which may "adjudge such person to be guilty of a third offence against the provisions of this Act," and "punish such offender by fine,"—thus treating fine as a punishment for offence against good order and rule. If the argument of the appellant's counsel is right, the appellant might be made to convict himself, and be punished.

CROMPTON, J. (the only other Judge present.)—I am *en-
tirely of the same opinion. I thought at first that the only [*310]
tenable point was the question of the admissibility of the evidence of
what occurred on the former occasion. For as to these prostitutes
behaving as they did being bad characters, and the landlord knowing
it, I entertain no doubt. But Mr. Welsby removed that difficulty by
admitting that the mere fact of the defendant having been guilty of

Gray, for the appellant.—This case is within the rule *stated [§ 314] by Coleridge, J., in *Reg. v. Cridland*, 7 E. & B. 853, 868 (E. C. L. R. vol. 90), that “the jurisdiction of justices to convict summarily ceases as soon as a claim of title is bona fide made.” [CROMPTON, J.—In Paley’s Law and Practice of Summary Convictions, 4th ed., p. 41, it is said to be a rule “that, where property or title is in question, the jurisdiction of justices of the peace to hear and determine in a summary manner is ousted, and their hands tied from interfering, though the facts be such as they have otherwise authority to take cognisance of.” WIGHTMAN, J.—If justices could not try the question whether this is a highway or not, it would be a short formula for getting rid of the jurisdiction given to them by sect. 73 of stat. 5 & 6 W. 4, c. 50, because any stranger might dispute whether the way was a highway or not.] The question whether the land of a person is subject to the burden of a highway over it is a question of title; *Dykes v. Blake*, 4 Bing. N. C. 463 (E. C. L. R. vol. 83); and the order affects the appellant, because under it the surveyor will proceed to sell his property; but if a stranger and not the owner had committed the nuisance, there would be no person before the justices whose title to the land could be set up. [WIGHTMAN, J.—Might not the appellant maintain an action against the surveyor for removing his property?] The action might perhaps be maintainable on the ground of want of jurisdiction. [WIGHTMAN, J.—The appellant might have appealed against this order to the quarter sessions under sect. 105.]

H. Matthews, in reply.—The way in question was a church way, and the land belonged to the appellant; and therefore title to land did not come in question. [WIGHTMAN, J.—Would not the order be evidence [§ 315] against the *appellant that the way in question is a highway? He is a party to the proceedings, seeing that he is called upon to answer a complaint for not removing the rubbish which he had deposited on the highway.] There is no provision in stat. 5 & 6 W. 4, c. 50, requiring that the person who has deposited rubbish on a highway should be summoned; besides which the order would only be evidence in a proceeding between the same parties. The whole jurisdiction of the justice fails if the way is not a highway; therefore he must decide the question whether it is one. [He cited *Reg. v. Dayman*, 7 E. & B. 672 (E. C. L. R. vol. 90).] [WIGHTMAN, J.—Sect. 73 of stat. 5 & 6 W. 4, c. 50, applies to a footway also.] The same question might arise on many other sections of this statute.

WIGHTMAN, J.—I am of opinion that the order ought to be affirmed. In this case the question of title to land did not arise. The land belonged to the appellant, and there was a right of way over it. The only question was, whether it was a highway. There is no clause in the Highway Act, taking away the summary jurisdiction of the justice if title to land comes in question, like the proviso in sect. 24 of the Malicious Trespass Act, 7 & 8 G. 4, c. 30, excepting injuries done under a bona fide claim of right, or like the clause in the Game Act, 1 & 2 W. 4, c. 32, s. 30, which enables the person charged with a trespass upon land to prove by way of defence any matter which would have been a defence to an action for such trespass. Upon this information, under stat. 5 & 6 W. 4, c. 50, s. 73, the magistrate could not stir a step without deciding whether the way in question was a high-

way. This he was bound to determine, and the appellant is not concluded by his decision. Therefore *this case differs from *Reg. v. Cridland*, 7 E. & B. 853 (E. C. L. R. vol. 90), and from [*316 other cases which might be cited.

CROMPTON, J. (The only other Judge present.)—At first I was struck by the way in which Mr. Gray put the case:—that title to land came in question, because the appellant said, this is my land subject to an easement of a private right of way. It is clear, as I said in *Reg. v. Cridland*, 7 E. & B. 853 (E. C. L. R. vol. 90), p. 871, that the magistrates are not, under the guise of a conviction, to decide a question of freehold title to land; and, as Coleridge, J., said in the same case, p. 869, this is a rule which does not depend upon a provision in any particular Act of Parliament. But when an Act of Parliament makes magistrates the very tribunal to decide whether the way is a highway or not, the legislature must have supposed them competent to decide it; and as Mr. Matthews said, the question whether it is a highway or not lies at the foundation of their jurisdiction. What is the dispute?—not whether the appellant had title to land, but whether the way was a highway or not. With regard to every other person except the owner of the land, there is no doubt as to the right of magistrates to try that question; and where the main object of an Act of Parliament is to give magistrates jurisdiction over a matter connected with land, there should be a special provision in order to take the case out of their jurisdiction, or stay proceedings, where title is in question or there is a bona fide claim of right, as there is in the Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, s. 24, the Act for ejectment by magistrates, 1 & 2 Vict. c. 74, s. 8, and the County Court Act, 9 & 10 Vict. c. 95, s. 58.

Order-confirmed.(a)

(a) See *Reg. v. Harden*, 2 E. & B. 188 (E. C. L. R. vol. 75).

***The QUEEN v. The Inhabitants of ST. GEORGE, Middlesex.** [*317
Feb. 15.

9 & 10 Vict. c. 66, s. 4.—Order of removal.—Sickness.

1. Stat. 9 & 10 Vict. c. 66, s. 4, by which “no warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness, unless the justices granting the warrant shall state in such warrant that they are satisfied that the sickness will produce permanent disability,” applies only to the case of sickness of the person removed.

2. Therefore where a man, in consequence of sickness, left his wife and children in the respondent parish, and went into an hospital in another, and his wife and children became chargeable to the respondent parish, it was held that an order for their removal to the parish of his settlement need not state that the justices were satisfied that the sickness would produce permanent disability.

On appeal against an order of two justices for the removal of Sarah Hesketh and her two children from the parish of St. George, in the county of Middlesex, to the parish of St. Mary, Whitechapel, the sessions quashed the order subject to the opinion of this Court on the following case.

In the order of removal above mentioned, dated 10th November, 1859, Sarah Hesketh was described as “the wife of William Hesketh

absent from her, and out of the said parish of St. George." And, at the time of making such order, the paupers named therein, and also the husband, William Hesketh, were legally settled in the parish of St. Mary, Whitechapel. In July, 1858, Sarah Hesketh, the pauper, first came with her husband and children to reside in the parish of St. George. On the 14th April, 1859, the pauper's husband, in consequence of his sickness, left his wife (the pauper) and children in the parish of St. George, and went into St. Thomas's Hospital, which is situate in the parish of *St. Olave, Southwark, in the county of Surrey, and remained there as a patient until the 5th of May following, when he left the Hospital and returned home to his wife and family, in the parish of St. George, and during all the time of his residence in the Hospital he intended to return home to that parish. Before the husband left the Hospital, namely, on the 16th of April, 1859, the pauper, Sarah Hesketh, alone, in the absence of her husband, applied for and obtained relief for herself and children from the parish of St. George, which was continued until May 14th, 1859. On the 23d May, 1859, the husband of the pauper applied for and received relief from the parish of St. George, which was continued until the 21st June, 1859, on which last mentioned day he voluntarily ceased to receive relief for himself or his family. On the 31st of August, 1859, the pauper's husband, in consequence of his sickness, which was consumption, again left his wife and family in the parish of St. George, and became an inmate of Guy's Hospital, which is situate in the parish of St. Olave, Southwark, and remained there as a patient until several months after the making of the order of removal. On the 10th of September, 1859, the pauper, alone, in the absence of her husband, but solely in consequence of his illness, applied for and obtained relief for herself and children from the parish of St. George, and continued in receipt of such relief until the 10th of November 1859, when the order for the removal of the pauper and her children was made. The pauper's husband, subsequently to the making of the order, left the Hospital, returned to his wife and family in the parish of St. George, and resided with them until the 14th of June, 1860, when he died. From the time the *pauper's husband ceased to receive relief from the parish of St. George, viz., from the 21st of June, 1859, to the time he went into Guy's Hospital, on the 31st of August, 1859, he and his wife and their children were maintained partly by the wife's industry and partly by pledging and disposing of their furniture, &c., and from the last mentioned date to the 10th of September, 1859, the wife maintained herself and children in the same way, and on that day she applied for and obtained relief from the parish of St. George, as above mentioned.

It was contended, on behalf of the parish of St. Mary, Whitechapel, the appellants, that the order of removal ought to be quashed on the ground, that the relief given to Sarah Hesketh, the pauper, was made necessary by reason of the sickness of her husband, William Hesketh, and because the order of removal did not state that the justices who made it were satisfied that such sickness would produce permanent disability in the said William Hesketh, as required by the statute 9 & 10 Vict. c. 66, s. 4.

It was contended, on behalf of the parish of St. George, the respond-

ents, that, as the paupers mentioned in the order did not become chargeable in respect of relief made necessary by the sickness of any one of them, the order was properly made; and that the statute above mentioned did not apply to a case like the present, where the person whose sickness was the cause of the chargeability of the paupers was absent from the parish obtaining the order of removal, and not included in such order.

The quarter sessions quashed the order of removal because the paupers became chargeable in respect of *relief made necessary by the sickness of the husband, and because such order did not state that the justices who made it were satisfied that such sickness would produce permanent disability. [*320]

The question for the opinion of this Court was whether, from the facts above stated, the relief given to Sarah Hesketh, the pauper, was made necessary by sickness within the meaning of 9 & 10 Vict. c. 66, s. 4, so as to require that the justices who made the order should have stated therein that they were satisfied the sickness of the husband of the pauper would produce permanent disability.

If the Court should answer the question in the negative, the order of Sessions was to be quashed and the order of removal confirmed, but if the Court should answer the question in the affirmative, then the order of Sessions was to be confirmed.

Metcalfe, for the appellants.—By stat. 9 & 10 Vict. c. 66, s. 4, “No warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant shall state in such warrant that they are satisfied that the sickness or accident will produce permanent disability.” The section does not say that the sickness which renders relief necessary and occasions chargeability must be the sickness of the person removed. It is immaterial whether it is the sickness of the husband, the wife, or the children:—in either case the warrant or order of removal should state that the justices were satisfied that the sickness would produce permanent disability; and the *omission of the statement is ground of appeal against the order: [*321] *Reg. v. The Inhabitants of Prior's Hardwick*, 12 Q. B. 168 (E. C. L. R. vol. 64), *Reg. v. The Inhabitants of Bucknell*, 3 E. & B. 587 (E. C. L. R. vol. 77). By stat. 4 & 5 W. 4, c. 76, s. 56, relief given to the wife and children is relief given to the husband. The effect of the construction of sect. 4 of stat. 9 & 10 Vict. c. 66, contended for by the respondents would be that if the husband was separated from his family for a few days by sickness, or accident, and his wife and family became chargeable, they would be removed from the residence of the head of the family, which is contrary to the policy of the statute.

Poland, contra.—The sickness of a husband absent from his wife does not make it necessary that the justices who are asked to remove the wife should inquire whether the sickness will produce permanent disability. To bring a case within stat. 9 & 10 Vict. c. 66, s. 4, the sickness must be the sickness of the person to whom the relief is given: for this purpose it is immaterial whether the husband is in a hospital or beyond seas. When the husband is absent the justices have no means of inquiring whether he is sick or not. If the sickness may be the sickness of any person other than the person men-

tioned in the order, the section would apply in the case of the sickness of a grandfather or uncle, or even of a person by whose bounty the family were maintained. [CROMPTON, J.—The object of the statute was to confer a personal exemption from removability on the sick person. WIGHTMAN, J.—That is the reasonable construction to be given to sect. 4; otherwise it would extend to the cases of sickness mentioned *by Mr. Poland. CROMPTON, J.—The object of sect. 4 is to prevent the removal of persons upon whom removal would be a hardship. The exemption is personal in respect of sickness or accident producing temporary disability—a state of circumstances under which the Legislature thought that a person ought not to be removed as much as residence in a parish for five years, which is provided for by sect. 1.]

Per CURIAM. (WIGHTMAN and CROMPTON, JJ.)

Order of Sessions quashed.

The QUEEN v. SYLVESTER and Others. Feb. 17.

Alehouse license.—Refusal to grant.—9 G. 4, c. 61, s. 1.

A Court of Quarter Sessions, at an annual licensing meeting, refused to renew a license to keep an inn, alehouse and victualling house under stat. 9 G. 4, c. 61, on the ground that the applicant declined to take out an excise license for the sale of spirits: held, that this was not a sufficient legal ground for such refusal.

ON appeals by Charles Townsend Sylvester and fourteen other persons to the October Quarter Sessions for the county of Berks, holden at Abingdon in 1861, against the refusal of the justices of the borough of Abingdon, at the general annual licensing meeting for the borough on the 29th August preceding, to renew to each of the appellants their licenses to keep an inn, alehouse and victualling house under stat. 9 G. 4, c. 61, "An Act to regulate the granting of licenses to keepers of Inns, Alehouses and Victualling houses in England," which appeals were consolidated, the Quarter Sessions confirmed the refusal of the justices subject to the following case.

*The house occupied by each of the appellants had been licensed as an inn, alehouse and victualling house. Some of the houses had been so licensed for a period of fifty years and upwards, and none for a less period than twenty years. Each of the appellants had been licensed for his house under the 9 G. 4, c. 61, during the time he had occupied it, but for the last few years had only taken out an excise license for the sale of ale, beer, &c., and not a license for the sale of spirits.

The usual general annual licensing meeting for the borough of Abingdon, in the county of Berks, in which the appellants' houses are situated, was held, according to the provisions of the Act, on the 29th August, 1861. The justices obtained a list of all the licensed persons in the borough of Abingdon, and resolved not to renew the license of any person who had not during the past year taken out an excise license to sell spirits. This list contained the names of the appellants and two other persons, all of whom had duly applied to the justices at such meeting for a renewal of their licenses. All the

licenses were renewed except those of persons who during the past year had neglected to take out an excise license to sell spirits. The meeting was adjourned, and the two other persons attended that adjournment, and the justices then present renewed their licenses upon their promising that they would take out an excise license for the sale of spirits. The house and premises of six of the appellants are rated at a sufficient sum to entitle them to obtain an excise license to sell beer under the provisions of stat. 11 G. 4 & 1 W. 4, c. 64, ("An Act to permit the general sale of beer and cider by retail in England;" amended by stats. 4 & 5 W. 4, c. 85, and 3 & 4 Vict. c. 11), and they have since the hearing of the appeal obtained *such license: [*324 but the houses and premises of the remaining nine appellants are not so rated, and they are not able to obtain any such license.

The question for the opinion of the Court was, Whether the justices at the annual licensing meeting acted illegally in refusing to renew the appellants' licenses on the sole ground that they declined to take out an excise license for the sale of spirits in addition to the license for the sale of beer. If this Court should decide in the affirmative, then the decision of the Court of Quarter Sessions was to be reversed, the appeals were to be allowed, and the license of each of the appellants was to be renewed. If in the negative, then the decision of the Court of Quarter Sessions was to be affirmed, and the appeals were to stand dismissed.

F. Lawrence in support of the order of sessions.—By stat. 9 G. 4, c. 61, s. 1, a general annual licensing meeting shall be held by justices of the peace in every town corporate, and it shall be lawful for them to grant licenses "to such persons as they the said justices shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper." The justices have a discretion under this section, and this Court will not interfere with it unless it has been illegally exercised. [WIGHTMAN, J.—The question put to us by the sessions is, "whether the justices at the annual licensing meeting acted illegally in refusing to renew the appellants' licenses on the sole ground that they declined to take out an excise license for the sale of spirits." They must mean to ask us whether it is sufficient legal ground of objection to granting an alehouse license that the person applying for it had not taken out an excise license for the sale of spirits.] They may in their discretion [*325 apply that test. If persons applying for a license under stat. 9 G. 4, c. 61, do not take out a spirit license the revenue will lose considerably.

Sawyer and *J. O. Griffits*, for the appellants.—In this case the licensing justices did not exercise a discretion as to the persons to whom licenses should be granted. When the appellants attended at the licensing meeting in pursuance of the notice required by sect. 2 of stat. 9 G. 4, c. 61, to be given to "every person keeping an inn, or who shall have given notice of his intention to keep an inn, and to apply for a license to sell excisable liquors by retail, to be drunk or consumed on the premises," they were met with a resolution of the justices not to grant a license unless a condition which the justices could not legally impose was complied with. In *The Queen v. Athay*, 2 Burr. 653, which was an information against a justice of the peace for refusing to grant a license, and the only reason for the refusal was

alleged to be, that the applicant declined paying a sum of 5*l.* which was claimed from him upon a distinct account, and which he denied to be due, the Court were of opinion that the allegation was false, but "declared explicitly that justices of the peace have no sort of authority to annex any such conditions to the grants of these licenses." In *The Queen v. The Justices of Walsall*, 24 L. T. 111, where the justices of the borough refused to hear an application for a license on the ground that they had come to a resolution not to hear any applications for new licenses, this Court made a rule absolute for a mandamus to them to hear the application.

*^{326]} Per CURIAM. (WIGHTMAN and CROMPTON, JJ.)—We do not interfere with the discretion of the justices in this matter. But if we are asked by them as to the exercise of their discretion, we think they were wrong. The refusal to take out an excise license for the sale of spirits is not a sufficient legal ground for refusing a license under stat. 9 G. 4, c. 61.

Judgment for the appellants.

The LONDON AND NORTH WESTERN RAILWAY COMPANY, Appellants, RICHARDS, Respondent. Feb. 17.

Stat. 5 & 6 W. 4, c. 63, s. 28.—Conviction.—Incorrect weighing machine.

Upon the conviction of a railway Company under stat. 5 & 6 W. 4, c. 63, s. 28., for having in their possession a weighing machine which upon examination thereof, duly made by the inspector of weights and measures, was found to be incorrect: held, that a machine which, from its construction, was liable to variation from atmospheric and other causes, and required to be adjusted before it was used, was not incorrect upon examination, within the meaning of the statute, if examined by the inspector before it had been adjusted.

THIS was an appeal against a conviction, by two justices of the county of Stafford, of The London and North Western Railway Company, for unlawfully having in their possession on the 16th July, 1860, at the Lichfield Station of the said railway, a weighing machine used for the weighing of goods for conveyance on the railway, which was, upon examination duly made by the inspector of weights and measures, found to be incorrect, to wit, 21 lbs. weight out of balance with the imperial standard weight, contrary to the form of the statute in that case made and provided: stat. 5 & 6 W. 4, c. 63, s. 28. The sessions confirmed the conviction subject to the opinion of this Court upon the following case.

*^{327]} The appellants, The London and North Western Railway Company, use the machine in question (called a weigh bridge) for the purpose of weighing the railway trucks into or from which goods conveyed along their line of railway are laden or unladen at their station at Lichfield. [A model of the weighing machine was to be produced, which it was agreed by both parties might be referred to as part of the case.] Machines of the same construction are employed on many railways in the kingdom. The parts of the machine to which it is necessary to draw attention are, the steel-yard which is under cover in a small office, and the platform which is outside, and which works in a frame, and rests upon levers connected with and

acting upon the steel-yard. Upon this platform are rails upon which the truck to be weighed is stopped. As these rails form part of the siding leading from the main line into the Company's warehouse, all trucks going into or coming out of that warehouse must necessarily pass over the platform. The weight of the plate of iron and rails which form the platform is 16 cwt., and its size is feet by feet. Being in the open air, it is exposed to any atmospheric influence, and a deposit of wet or dirt renders it considerably heavier, a shower of rain causing an increase of its weight of 11 or 12 lbs.; it is also liable to be thrown out of poise by the wagons which pass over it from the main line to the warehouse, causing the platform to jamb on one side of the frame, and thus effecting a variation in its weight and bearing. This weigh bridge is calculated to weigh up to 16 tons. The average weight of an empty truck (being the lightest article that is weighed upon the machine) is about 3 tons; the arm of the steel-yard is graduated so as to indicate variations of 4 lbs. An [*328 approximation within half a hundred weight is, however, alone considered and charged for by the Company on all goods weighed by this machine. To compensate for any derangement of the machine effected by the causes above referred to, an adjusting ball is affixed to the end of the long arm of the steel-yard. This ball by being passed backwards or forwards along the thread of the screw on which it works, causes the end to which it is attached to be heavier or lighter, and thus produces a compensation for any variation in the weight or bearing of the platform. A copy of the following instructions was affixed in the office for the guidance of the person who had the charge of, and whose duty it was to weigh goods upon, the machine in question.

“London and North Western Railway.
“Weighing Machines and Weigh Bridges.

“Instructions to Persons in Charge.

“I. Every part of the machine is to be kept clean and free from accumulations of oil and dirt, and the registered label of the machine is to be kept upon it.

“II. The steel-yard and poise are to be kept bright, so that the letters and figures may be legible.

“III. Once every month the machine is to be taken to pieces, all the knife edges and working parts cleaned and slightly oiled. This applies also to weigh bridges, except as respects their being taken to pieces.

“IV. First thing every morning every machine is to be accurately balanced, ready for work. Special care must be taken that every machine has its own weights, and no others.

“V. Every machine which has a break, lever, or other ungearing apparatus is to be carefully kept out of gear [*except at the moment of weighing, in order that no unnecessary wear may take place.

“VI. Every facility and assistance in lifting, &c., is to be given to the weighing machine makers when they visit the station to inspect or repair the machine.

“VII. Complaints are to be addressed to Mr. Henry Pooley, Liver-

pool, and in such complaints the registered number of the defective machine is to be stated.

"W. CAWKWELL, General Manager."

"Euston Station,

"November, 1859."

These instructions are printed by the Company, and a copy of them is sent to every station where there is a weighing machine of this description. At some of the stations of the Company these machines are used several times in every day. At the Lichfield Station it appeared that the machine in question was sometimes not used for a week together, and was rarely, if ever, used two consecutive days. The person who had charge of the machine said he considered that to adjust it before it was used was a better plan than to adjust it every morning, as any of the causes above referred to might at any time during the day on the morning of which it had been adjusted throw it out of poise, and a fresh adjustment would be necessary; and that, instead of balancing it every morning, he only did so before using it, but that it had never been used without having been previously adjusted. The respondent, Maurice Richards, the inspector of weights and measures for the district in which the Company's station at Lichfield is situated, visited in the course of his duties the machine, for the purpose of inspecting it, on the afternoon of the 18th July last, and found it in gear. The machine had not been used on the day of *330] the *inspector's visit, and upon his proceeding to test it, without making any use of the adjusting ball, which he did not consider to be a part of his duty as inspector, he found that it was necessary, in order to put the machine in poise, to place weights amounting to 21 lbs. on the platform; a porter passed an iron bar round the frame, so as to free the platform, and an adjustment having been made by another of the Company's servants by moving the adjusting ball, and the weights placed on the platform by the inspector having been removed, the machine was found to balance. The inspector of weights and measures for the borough of Birmingham deposed that he considered a machine of that capacity which would weigh within 40 lbs. to be correct. The machine has remained and still is in the same state as it was at the date of the inspector's visit, and upon the adjustment which the appellants contend for being made it continues to weigh correctly.

The appellants contended:

First. That it was the duty of the inspector of weights and measures, before proceeding to examine the machine, to have taken the necessary steps for putting it in poise by having the adjusting ball moved, and so placing it in the state in which the appellants invariably placed it before using it, and that an examination without that adjustment was not such an examination as is contemplated by the Act, so as to render the appellants liable to a penalty under that Act for having in their possession a machine which is incorrect or otherwise unjust within the meaning of the 28th section of the Act.

Second. That their printed instructions are intended only for the guidance of their servants and to apply singula singulis; and that *331] they are amply obeyed at *stations, where the machine is not used every day, by its always being adjusted before used.

Third. That, in the present case, there was no such variation as to cause the machine to be considered "incorrect or otherwise unjust" within the meaning of the Act.

The respondent contended :

First. That the facts above stated justify a conviction and the order of Sessions thereon.

Second. That it is the duty of persons possessing such a machine to keep it in such a state as that when goods are brought to be weighed nothing should be required to correct the machine, but that it should be ready for weighing.

Third. That the appellants are at any rate bound by their instructions to their servants, and that it was their duty to have the machine adjusted every morning.

Fourth. That the machine ought to indicate correctly (without reference to its capacity) the smallest difference of weight marked upon its graduated index.

The question for the opinion of the Court is : Whether, upon the above facts, the appellants were liable to be convicted, under sect. 28 of the 5 & 6 W. 4, c. 63, of the offence alleged in the conviction.

If the Court should be of opinion that they were liable to be convicted, the order of Sessions and the conviction were to be affirmed.

If the Court should be of the contrary opinion the same were to be quashed.

J. E. Davis (with him *George Browne*), for the respondent.—The machine was found incorrect by the inspector within the meaning of stat. 5 & 6 W. 4, c. 63, *s. 28, and consequently the appellants [*332 were liable to the penalty. The machine was in gear at the time, and was therefore ready for weighing and capable of weighing, although incorrectly. The adjusting apparatus is only a contrivance for restoring the equilibrium instead of resorting to the primitive method of affixing an additional weight at one or other end of the beam. It is therefore no more an answer to say that the machine was always adjusted before use, than it would be for a shopkeeper, who had untrue weights or scales, to say that he always put a penny-weight into the scale before weighing. The object of the statute is not only to detect actual fraud, but to prevent, as far as may be, the possibility of fraud. Weighing machines of this description are especially within the mischief intended to be guarded against, for the public have no opportunity of detecting inaccuracies themselves, seeing the process of weighing takes place inside the office or weighing house, to which they have no access. The rules framed for the guidance of the defendants' servants show the view taken by the defendants of their duty in reference to the statute, and the case finds that those rules had been wilfully violated ; inasmuch as the machine was not adjusted at the time prescribed, and was kept in gear when it ought to have been at rest. It is, moreover, clear that the inaccuracy did not arise from any water or mud on the surface of the platform, for that would have affected the machine the other way, and instead of the additional weight being required on the platform, it would be required at the opposite end of the beam. The inaccuracy in the present case must be attributed to some other cause ; and the case shows that an iron bar had to be applied before the machine was restored,

*333] and the *justices may have arrived at the conclusion that the machine was incorrect from that cause. [CROMPTON, J.—I think we must take it that the justices arrived at the conclusion that the machine was incorrect because they thought there was no obligation on the inspector to use the adjusting apparatus in the first instance.] If the other facts are sufficient to support the decision of the justices, this Court will not disturb the conclusion at which they arrived. [WIGHTMAN, J.—It is impossible that the machine should always weigh accurately. Rain, and even variations in temperature, would cause variations in the machine, and the amount is of course immaterial. So also the case finds that wagons passing over cause a derangement and a necessity for readjusting it. Do you say that, if the inspector examined the machine the moment after any such derangement, the defendants would be liable to the penalty?] The inspector can only make the examination at a reasonable time and under reasonable circumstances; and it must be taken that the justices were satisfied that this examination was so made. It would not be reasonable to make an examination when there had not been any time for adjustment.

Hayes, Serjt. (with him *A. Stavely Hill*), for the appellants, was not called upon.

WIGHTMAN, J.—I am of opinion that the conviction cannot be supported. This weighing machine before adjustment is false, but in the true state of adjustment for weighing it is correct. It is too much to say that because the machine requires adjustment before it is used it is an incorrect or otherwise unjust machine.

*334] *CROMPTON, J. (The only other Judge present.)—The conviction of the defendants is for having a weighing machine which, upon the examination made by the inspector, was found to be incorrect. But before the machine is used it must be adjusted, and this adjustment was not made by the inspector before his examination; and the machine was found to be incorrect because it was not adjusted. It cannot therefore be said to be incorrect for the purpose of weighing because it is found in a state in which it would not be used for weighing.

In the ordinary case of a false steel-yard there is an intentional falsity which may be corrected by putting an additional weight on the false arm: in this case an inaccuracy in the machine which may have been occasioned by atmospheric influence is to be corrected, and the great beauty of the machine is that, when an inaccuracy may or rather must constantly occur, the machine has in itself an appliance by which that inaccuracy may be remedied. Unless that appliance, which is an integral part of the machine, is used, the instrument cannot be said to be properly tested, any more than you could say that a telescope gave an improper result if you did not draw it out so as to get the right focal distance before using it.

Order of Sessions and conviction quashed.

*ALICE TAYLOR, Appellant, CARR and PORTER, [*335 Respondents. Feb. 18.

20 G. 2, c. 19, s. 1.—*Master and servant.—Non-payment of wages.*

The summary jurisdiction given to justices by stat. 20 G. 2, c. 19, s. 1, to hear complaints against masters by artificers and other labourers of non-payment of wages, and to order payment thereof, extends to cases in which the contract of service is not for any certain time.

CASE stated by justices under stat. 20 & 21 Vict. c. 43.

At a petty sessions, holden at Blackburn, in the county of Lancaster, on the 5th July, 1861, a complaint preferred on the 24th November, 1860: on which day a summons was issued and disposed of: by Alice Taylor, the appellant, against Carter and Porter, the respondents; which complaint charged that they had refused to pay to the appellant the sum of 9s. 2d. as the wages justly due and owing from them to her for work and labour done and performed by her for them at their request, contrary to the form of the statute in such case made and provided, was heard and determined.

[During the argument of the case in this Court, it appeared that after the hearing of the summons on the 24th November, 1860, counsel for the complainant made the following endorsement on his brief: "This case to abide the decision of the Court above in Mary Taylor's case," who was a sister of the appellant.(a)]

*Upon the hearing of the complaint it was proved, on the part of the appellant, and found as a fact, that, on Monday, the 6th August last, the appellant was working for the respondents as a weaver; that she asked for leave of absence for the afternoon of that day from Thomas Booth, the overseer. Leave was granted on condition that she should return to her work at six o'clock on the following morning, and that she should find a substitute during her absence. She found a substitute, but did not return to her work as agreed upon; but at dinner time on the 7th August she went to the overseer's house, when she was told that she must not return to her work, that her looms were stopped. It was further proved, and found as a fact, that there was more than 8s. 2d. owing to the appellant at that time: that at the respondents' mill the week ends on Thursday morning at breakfast time: and that on Saturday, the 11th August, the appellant applied to the overseer for her wages, when she was told she was not to have them. On the following Wednesday she saw the overseer again, when he agreed that she should have the wages if she would go back and work her notice: that the appellant agreed to go back, and went the day after (Thursday) at dinner time, when the overseer said that she ought to have gone at breakfast time, and would not let her begin to work. The appellant was then prepared to work her notice.

It was contended, on the part of the respondents, that the appellant had not proved that the hiring was for any definite period, or for an

(a) In Easter term, 1861, it was held by Wightman, J., in the Bail Court, that Mary Taylor, who, having leave of absence for half a day, did not return to her work at the appointed hour, had not forfeited her wages under one of the rules of the mill by which any persons absenting themselves for any cause must give notice, and in default thereof all wages then earned would be forfeited. See Mary Taylor, appt., Carr and Porter, resps., 30 L. J. M. C. 201.

*337] unlimited period determinable *on a given notice; that she had not proved that the complaint was laid within six calendar months; and that, as a summons had been issued before on the same complaint, and disposed of, the justices had no jurisdiction. The justices, being of opinion that the objections raised were valid, dismissed the complaint.

The questions for the opinion of the Court were:

First. Whether the appellant ought not to have proved that there was a contract which came within the jurisdiction of the justices.

Second. Whether she ought not to have proved that the complaint had been laid within six calendar months.

And Third. Whether the justices had jurisdiction to issue a second summons on a complaint made within six calendar months from the time when the cause of complaint arose, a summons having been previously issued on the same complaint and disposed of.

If the Court should be of opinion that the dismissal was legally and properly made, then the dismissal was to stand, but if the Court should be of opinion otherwise, then an order for payment of 9s. 2d., the amount of wages, was to be made.

Torr, for the appellant.—As to the first question, stat. 20 G. 2, c. 19, s. 1, enacts that "all complaints, differences, and disputes, which shall happen or arise between master and mistresses, and artificers and other labourers employed for any certain time, or *in any other manner*, shall be heard and determined by one or more justice or justices," who are empowered to order payment of so much as is just and reasonable. It has indeed been decided upon stat. 4 G. 4, c. 34, *338] s. 3, that there must *be a contract of service: *Hardy v. Ryle*, 9 B. & Cr. 603 (E. C. L. R. vol. 17), *Lancaster v. Greaves*, 9 B. & Cr. 628; but it need not be for any specific time. In this case it is sufficiently clear that there was a hiring, which constituted the relation of master and servant. [CROMPTON, J.—There was reasonable evidence that there was a contract to serve.]

As to the second and third questions, the complaint was within the six months. The case states that the complaint was "disposed of," but that phrase is not synonymous with "heard" or "determined;" and the endorsement on the brief of counsel at the hearing of the summons on the 24th November, 1860, shows that the complaint was only temporarily disposed of.

Holland, contra.—The words of stat. 4 G. 4, c. 34, s. 3, are "if any servant in husbandry, or any artificer, labourer, or other person shall contract with any person or persons whomsoever to serve him, her, or them for any time or times whatsoever, or in any other manner, &c." But the cases decide that the hiring must be for a certain definite period. It is not clear that this was not a contract to do a certain quantity of work; and stat. 4 G. 4, c. 34, s. 3, does not apply to such a case: *Hardy v. Ryle*, 9 B. & Cr. 603 (E. C. L. R. vol. 17), *Lancaster v. Greaves*, 9 B. & Cr. 628, *Ex parte Johnson*, 7 Dowl. P. C. 702. In *Mary Taylor*, appellant, Carr and Porter, respondents, 30 L. J. M. C. 201,(a) two rules of the mill were in evidence at the hearing, and were stated in the case. [WIGHTMAN, J.—The distinction between the cases cited and the present is that a person contracting

(a) See ante, p. 335, note (a).

to do certain work is not a servant, whereas a labourer employed to work in a mill is. CROMPTON, J.—Where the master is proceeding, under sect. 3 of stat. 4 G. 4, c. 34, against *a person for leaving his service, he must show that the relation of master and servant existed, so that the servant might not leave his service at any moment; and therefore in that case it is material to ascertain that there was a definite time of service. But it is not so where an artificer is proceeding under sect. 1 of stat. 20 G. 2, c. 19, for wages; there is no authority that in such a case it is necessary to show what particular time he was bound to stay. The appellant was clearly bound to stay in the service of the respondents some time; that is the meaning of the contract into which the parties entered. The case must go back to the justices, with the opinion of this Court, that they ought to make an order on the former summons for payment of wages to the appellant if the hearing of it stood over until the determination of the appeal on the complaint of Mary Taylor; but if not, no order should be made.]

Per CURIAM. (WIGHTMAN and CROMPTON, JJ.)

Case sent back accordingly.

The QUEEN v. The Official Principal of the Consistorial Court of London. Re ADAMS and Another v. BEALL. Feb. 22.

Church Building Act, 58 G. 3, c. 45, s. 70.—District parish.—Church rate.—“Repairs.”—Prohibition.

1. Sect. 70 of stat. 58 G. 3, c. 45, which authorizes rates for the “repairs” of district churches, includes rates “to be raised within the district, in like manner as in case of repairs of churches by parishes,” for the expenses necessary for the due performance of the offices of the church, as well as for the repairs of the fabric.

2. The parish of L. was divided into three ecclesiastical districts, under sect. 21 of stat. 58 G. 3, c. 45, and subject to the provisions of that and the other Church Building Acts; and one of such districts was assigned to a church called the church of St. B., built under the provisions of those Acts at S., and was called the district parish of St. B., S. A rate was made in form “for and towards the repairs of the district parish church of St. B., S.” but in fact for other necessary expenses also, such as lighting and washing, and stationery for registers, &c. Upon a rate for a prohibition, held, that the expenses for which the rate was made were legal.

IN Trinity Term, 1861,

Collier moved for a rule calling upon the Vicar-General of the Lord Bishop of London and Official Principal of the Consistorial Court of London to show cause why a writ of prohibition should not issue, directed to him, to prohibit him from further proceeding in a suit in the said Court, instituted by Mayow Wynell Adams and Benjamin Parsey, churchwardens of the district parish of St. Bartholomew, Sydenham, in the county of Kent, against Richard Beall, for subtraction of church-rate.

The libel, which was brought before the Court upon affidavit, alleged: “First, That in the year 1855, a portion of the parish of Lewisham, in the county of Kent and diocese of London, was, by an order of Her Majesty in Council, bearing date the 8th February, 1855, made in pursuance of an Act of Parliament passed in the 58th year of the reign of His Majesty King George the Third, intituled ‘An Act for building and promoting the building of additional churches in popu-

lous parishes," and in pursuance of all other powers in such behalf contained in the Church Building Acts, formed into a district parish for ecclesiastical purposes, and the bounds and limits of such district parish were prescribed and defined as by law directed, by the title or description of the district parish of St. Bartholomew, Sydenham, and such district parish was assigned to the consecrated church of St. Bartholomew, situate at Sydenham, in the said parish of Lewisham; *341] that such district church *thereby became by law a district church for all ecclesiastical purposes, and the persons inhabiting such district parish are, under the law in that behalf made and provided, and under the authority of the said statute of the 58 Geo. 3, c. 45, and other statutes, liable to contribute to the repairs of the said district church of St. Bartholomew, Sydenham, and to contribute to any rate or rates made for the repairs of the same, and for the payment of the expenses necessary and legally incident to the decent celebration of divine service therein, and to the office of churchwardens in the said district parish; and in part supply of proof of the premises, the party proponent craves leave to refer to the aforesaid order of Her Majesty in Council of the 8th of February, 1855, printed in the London Gazette of the 18th of February, 1855," &c.

"Second, That the churchwardens of the district parish of St. Bartholomew, Sydenham, had not sufficient funds in hand to effect the necessary repairs of the district parish church, and to provide necessaries for the decent celebration of divine service and offices therein, and for the other expenses necessary and legally incident to their office, for the then current year; wherefore they, the churchwardens aforesaid and others the parishioners and inhabitants (rate-payers) of the district parish, on the 14th June, 1860, met together in vestry in the National School-room at Sydenham aforesaid, pursuant to notice thereof previously and duly given according to law, to make a rate, in order to raise funds for the purposes aforesaid." [The notice was set out], &c.

The 3d article of the libel alleged that at the vestry meeting the churchwardens produced an estimate made by them of the probable *342] expenditure for repairs of the said district parish church, and for other the necessary *and lawful expenses incident to the execution of their office of churchwardens for the year, which was read to the meeting. The estimate was as follows:

"Estimate of the Expenditure of the Churchwardens of the District Parish of Saint Bartholomew, Sydenham, from Easter, 1860, to Easter, 1861.

	£	s.	d.
"Organist	52	10	0
"Cleaning of church and attendant	35	0	0
"Beadle	20	0	0
"Organ blower	5	0	0
"Organ tuner	5	0	0
"Clock winder	5	0	0
"Coals and firing	15	0	0
"Candles	15	0	0
	<hr/>		
	152	10	0

	£	s.	d.
Brought forward	152	10	0
"Transcribing registers	3	0	0
"Insurance of church	13	11	3
"Repairs	45	0	0
"Water and gas rates, printing, stationery and contingencies	23	0	0
	<hr/>		
	£237	1	3
	<hr/>		
"A rate of 2d. in the £ on 35,812 <i>l.</i> , the gross rental of the parish will return	£298	8	8
"Deduct for empty houses, defaulters, &c., 15 <i>l.</i> per cent.	£45	0	0
"Cost of collection at 5 <i>l.</i> per cent.	12	13	6
	<hr/>	57	13
"Estimated net produce of rate	£240	15	2
	<hr/>		

"M. W. ADAMS,
"BENJAMIN PARSEY, } Churchwardens."

*And a resolution was duly moved and seconded that the estimate be adopted, and that a church rate of two pence in the pound should be granted; but an amendment was moved, which, upon a show of hands, was carried, and thereupon a poll was demanded by the churchwardens and granted by the chairman.

The 7th article, after stating the adjournment of the meeting to the 15th of June for the purpose of taking the poll, the proceedings at the poll and the result thereof in favour of the resolution, proceeded to allege "That the said rate was accordingly made, and the said chairman and the said churchwardens and several other ratepayers of the district parish signed the same, and thereby taxed all and every the inhabitants and parishioners of the said district parish of St. Bartholomew, Sydenham, at the several sums set opposite their respective names, and mentioned and contained in a certain book, &c., for and towards the repairs of the church of the said district parish, and for and towards providing necessaries for the decent celebration of divine service and offices in the same, and for and towards the other expenses necessary and legally incident to the office of churchwardens in the said district parish, and for such other purposes as are by law raisable and payable by, from and out of the rate, commonly called a church rate, for the then current year, being a rate of 2*d.* in the pound on the assessment for the poor in the said parish."

The title of the rate was as follows:

"District parish of St. Bartholomew,
"Sydenham, Kent.

"We, the churchwardens and other parishioners of the district parish of St. Bartholomew, Sydenham, in the county of Kent and diocese of London, whose names are hereunto subscribed, do, at this our vestry meeting *for that purpose assembled, rate and tax all and every the inhabitants and parishioners of the district parish aforesaid hereafter named, at the sum of 2*d.* in the pound upon

the several assessments hereinafter set forth, for and towards the repairs of the said district parish church of St. Bartholomew, Sydenham, in the county of Kent, for the present year."

"As witness our hands this 15th day of June, 1860." (The signatures of the perpetual curate, the churchwardens and six other parishioners were attached.)

After the assessments the following note was added:

"At a vestry meeting this day held and convened by due notice, we whose names are hereunto subscribed, inhabitants of the district parish of St. Bartholomew, Sydenham, in the county of Kent, do agree to the before written church rate or assessment. As witness our hands this 15th day of June, 1860." (The same signatures were attached.)

The libel further alleged (among other things) that Richard Beall, at the time of making the rate, occupied a messuage in the district parish of St. Bartholomew, Sydenham, of the yearly rateable value of 185*l.*, and was duly and legally assessed in the rate in respect of the said messuage in the sum of 1*l.* 2*s.* 6*d.*; that he refused or neglected to pay the same; that the churchwardens caused him to be summoned before a metropolitan police magistrate; that he attended the summons, and declared to the magistrate that he disputed the validity of the rate.

The admission of the libel was objected to in the Consistorial Court on several grounds; among others, that it appeared by the estimate that the rate was made for various purposes other than the repairs of the district church, whereas there was no lawful authority to make [§345] such rate on the inhabitants of a district parish, except for the purpose of the repairs of the district church. But the Judge of the Court overruled the objections and admitted the libel.(a)

(a) The judgment of Dr. Twiss, given on the 22d May, 1861, was cited by counsel on showing cause against the rule. He said, "The objections to the admissibility of the libel in this case are directed against the first and second articles alone; but they raise questions of law which will lead to the rejection of the libel altogether, if the Court entertains them. The counsel for the defendant contended that the first article contained an erroneous statement of the law, inasmuch as it stated that persons inhabiting a district parish were, under the 68 G. 3, c. 45, liable to any rate made for the repairs of the district church, and for the expenses necessary and legally incident to the decent celebration of divine service therein, and to the office of churchwardens in the district parish. It was urged, in support of the objection, that the 68 G. 3, c. 45, s. 70, spoke only of the repairs of district churches, and that the word 'repairs' was to be construed strictly, and did not extend to other charges than were necessary for the maintenance of the fabric. In answer to that objection the counsel for the churchwardens directed attention to the judgment of his learned predecessor, Dr. Lushington, in the case of Chesterton and Hutchins v. Fariar, 1 Curt. 345. In that case it was contended that, as regarded the parish church, a wider interpretation must be given to the word 'repairs' in respect of the application of the 71st section of the Act. The 70th section, under which the objection was taken, enacts 'that the repairs of all such district churches or chapels shall be made by the districts to which they respectively belong, by rates to be raised within the district, in the like manner as in case of repairs of churches by parishes'; therefore the statute establishes an analogy between the repairs of district churches and the repairs of churches of parishes under the common law: and the section further enacts 'that every such district shall be deemed in law a separate and distinct parish for that purpose.' The 71st section provides that every such district shall remain subject for twenty years to the repair of the original parish church, and be deemed part of the original parish for all purposes of such repairs, and the making and levying of rates for that purpose. Dr. Lushington held that the word 'repairs' in the case of a district church must be taken with reference to rates not merely for the maintenance of the church, but also for expenses incidental to the office of churchwarden, that is to the services of the church. He was of opinion that he could not draw a substantial distinction between the word 'repairs,' when applied to a

**Collier* cited *Veley v. Burder*, 12 A. & E. 265, 310, 311 (E. C. L. R. vol. 40), per Tindal, C. J.; and 3 Burn Eccl. Law, 9th ed., [*346 by Phillimore, *Prohibition II.*, 893, to show that this was a case in which prohibition would lie.

An affidavit in answer to the application for the rule stated that, by an order made by the Commissioners appointed under the Church Building Acts, and dated the 21st of May, 1853, the Commissioners assigned the whole of the pew rents of the church of St. Bartholomew, Sydenham, as a provision for the spiritual person appointed to serve the church, subject only to the payment of 15*l.* a year to the clerk of the church. That the gas rate charged in the churchwardens' estimate was a payment annually made by the churchwardens to a gas Company for a light at the entrance to the church. That the water rate charged in the estimate was a payment annually made by the churchwardens to a water Company for a supply of water laid on to the church for the purpose of cleaning the same and other necessary purposes. That the printing and stationery charged in the estimate included the baptismal register books, the printing of the customary notices of vestry meetings, notices of rate, collector's receipt book, polling book, pens, ink and paper and other expenses absolutely necessary on occasions of polls and other vestry meetings.

The rule was argued in Michaelmas Term, November 9th and 11th, 1861; before Cockburn, C. J., Wightman and Blackburn, JJ.

**Coleridge* and *Dowdeswell* showed cause.—The first and principal question turns on sects. 70 and 71 of stat. 58 G. 3, c. 45. From the preamble it appears that it was intended to create district parishes and churches with all the incidents to parishes and churches at common law. Under that statute there are three modes of subdividing populous parishes. First, by sect. 16, the Commissioners appointed for the execution of that Act are empowered to divide any parish "into two or more distinct and separate parishes for all ecclesiastical purposes;" and in that case the tithes and all other endowments are divided. Secondly, sect. 21 empowers the Commissioners to divide a parish into "ecclesiastical districts;" in that case the parish is entirely separate in every respect except as regards tithes. Thirdly, under the same section, the Commissioners may erect and aid in the building of additional chapels to be served by curates nominated by the incumbents of the parishes; these are chapels of ease. The district parish of St. Bartholomew, Sydenham, is the case of an ecclesiastical district formed under sect. 21. By sect. 24, "such districts shall thereupon become and be called district parishes, by such names as shall be given to them respectively in the instrument so enrolled as aforesaid, and shall become and be separate and distinct district parishes, and the churches and chapels respectively assigned to such districts shall, when duly consecrated for that purpose, become and be the district parish churches of such district parishes, for all purposes of ecclesiastical worship and performance of ecclesiastical duties, and as to all

district church, and the same word when applied to the original parish church; and as the judgment of my learned predecessor is binding in this Court until reversed by a superior Court, I must, in accordance with that judgment, overrule the objection made to the first article, which will lead also to the overruling of the objection to the second article. Therefore, on the authority of that judgment, I overrule the objections to the admissibility of the libel."

marriages, christenings, churchings and burials, and the registry thereof respectively within the same, and in relation to all fees, oblations and offerings, and the *demanding, suing and prosecuting [§ 348] for and recovering the same, and as to all other purposes whatsoever, save and except as is in this Act particularly excepted." By sect. 27 "all Acts of Parliament, laws and customs relating to publishing banns of marriage, marriages, christenings, churchings and burials, and the registering thereof, and to all ecclesiastical fees, oblations or offerings, shall apply to such separate and distinct parishes and district parishes so made as aforesaid, when they shall so become complete, separate and distinct parishes or district parishes, under the provisions of this Act, after the death, resignation or other avoidance of the existing incumbents respectively in each such parish or extra-parochial place, and to the churches and chapels thereof, and to the ecclesiastical persons having cure of souls, or serving the same, in like manner in every respect as if the same respectively had been ancient, separate and distinct parishes and parish churches by law, to all intents and purposes." Sect. 29 mentions that books of registers are to be provided for entering the publications of banns and solemnization of marriages, and the baptisms and burials in such district churches or chapels. By sect. 31, which is the first which mentions church rates, "no divisions of any parish or extra-parochial place, whether it be divided into separate parishes with the consent of the patron and bishop of the diocese, or into district parishes, nor anything in this Act contained in relation thereto, shall affect or in any manner be construed to affect any parish or extra-parochial place so divided, or the persons residing therein, in any other respect than in this Act particularly provided, or in any manner to apply to any poor or any other parochial rates which may be raised in the parish or extra-parochial [§ 349] *place so divided, or in any such separated parish or district parish, or to the maintenance or relief of poor persons, or to any title or claim to such relief, or to any powers relating to any such rates, or holding vestries, or appointment or powers of parish officers, or any such relief or claim thereto, or to any Act or Acts of Parliament or law or custom relating thereto, save and except as to church rates, in so far as the same are regulated by the provisions of this Act." The effect of this section is to set up church rates, except so far as is qualified by the Act. By sect. 56, "The church rates of the parish" shall be the security for the repayment of all money expended by the parish in providing a site for a new church or chapel, or advanced by the Commissioners to any parish under the provisions of the Act; and such sums of money are made chargeable upon such rates. That section shows that the Legislature assumed the church rate of the parish to exist, and imposes a charge on it unknown to the common law. Sect. 57 extends the operation of the Act to extra-parochial places by enacting that a church rate shall be raised there. Sect. 63 empowers the Commissioners to fix the amount of the pew rents in any such church or chapel, which are to form a fund out of which provision is to be made for the minister and for a clerk; and sect. 64 empowers the Commissioners to assign a stipend to the minister out of pew rents. By sect. 70 it is enacted "that the repairs of all such district churches or chapels shall be made by the districts

to which they respectively belong, by rates to be raised within the district, in like manner as in case of repairs of churches by parishes; and every such district shall be deemed in law a separate and district parish for that purpose; and *the repairs of all chapels not made district churches shall be made by the parish in or for [*350 which the chapels shall be built. Sect. 71. "Provided always, and be it further enacted, That every such district shall remain nevertheless subject for twenty years, to be accounted from the day upon which the district church or chapel shall be consecrated, to the repair of the original parish church, and be deemed part of the original parish for all purposes of such repairs, and the making and levying of rates for that purpose; and from and after the expiration of such twenty years, the parish church shall be repaired by the district of the parish left as belonging to it after the other divisions of districts are made; and each district shall forever thereafter make, raise, levy, collect and apply separate district rates for repairs of the church or churches or chapels of the district, as if a separate parish."

Then the question arises, did sects. 70 and 71 alter the common law state of things? It will be said that this is an imposition of a tax on the subject, and therefore the words are to be construed strictly; but the word "repairs" has obtained a legal sense, and therefore when it occurs in an Act of Parliament it must be understood in that sense, unless there is something in the Act to show that it was not intended to be so used. The cases have settled that what may be called "legal necessaries" for the church come under the name of "repairs," if voted by the vestry. In the ordinary form of church rate, from all time, the inhabitants have been assessed "for and towards the repairs of the church;" and all other expenses are included under those words: this is the form given in 1 Burn's Eccl. Law, 9th ed., by Phillimore, 384 b, and in Roger's Eccl. Law, 2d ed., 220. [*Collier, contra.*] [*351 The form of the rate in *Burder v. Veley*, 12 A. & E. 233, 240 (E. C. L. R. vol. 40), was "for and towards the necessary repairs of the church of the said parish, and the other expenses necessarily and legally incident to the office of the churchwardens of the said parish."] Those words were perhaps introduced to meet any objection which might be made. In *Chesterton v. Farlar*, 1 Curt. Eccl. Rep. 345, 355, Dr. Lushington decided that the inhabitants of a district created under stat. 58 G. 3, c. 45, were liable to be assessed to the incidental expenses of the church of their parish in the same manner as to the repairs of the mother church.

Further, the object of stat. 58 G. 3, c. 45, was to provide for the division of populous parishes and the celebration of divine service in parishes so divided. Sect. 70 contains nothing to restrain the general provisions of the preceding sections; and if that section were omitted the power would be implied. If the word "repairs" in the latter clause of sect. 71 only means repairs of the fabric, and does not include expenses of divine service, the old parish would, after twenty years, lose the power of making a church rate at common law; and the word "repairs" must have the same meaning in sect. 70 as it has in sect. 71. Sect. 73 imposes on the churchwardens of the district church the common law incidents of the office of churchwarden; so much so, that stat. 59 G. 3, c. 134, s. 23, provides that they shall not,

by virtue of such office, be deemed overseers of the poor. These sections assume the existence of a church rate for other purposes than the repair of the fabric of the church.

Secondly, this construction of stat. 58 G. 3, c. 45, is strengthened by the subsequent statutes 59 G. 3, c. 134, and 3 G. 4, c. 72. By sect. 64 [§352] of stat. 58 G. 3, c. 45, *the Commissioners may allow out of the pew rents a sum for the stipend of the minister. By sect. 27 of stat. 59 G. 3, c. 134, the pew rents, after payment of the stipend of the incumbent and other expenses mentioned in sect. 26, shall be applied "in keeping the church in repair, and the residue of such pew rents, if any," shall be applied "in aid of the church rate to be raised in such parish." In the present case all the pew rents have been allotted to the minister, and therefore there is no fund to which sects. 26 and 27 of stat. 59 G. 3, c. 134, can apply. In stat. 3 G. 4, c. 72, ss. 20, 21, the word "repairs" is used with reference to other things than mere repairs of the fabric of the church.

Thirdly, this rate would be a good common law church rate according to the received interpretation of the term "repairs" as applied to church rates. Even if some of the things in the estimate would not be legal without the consent of the vestry, they may with that consent be included under the word "repairs:" per Dr. Lushington, in *Gathercole v. Wade*, 1 Burn Eccl. Law, 9th ed., by Phillimore, 388 a, and *Smith v. Dixon*, 2 Curt. Eccl. Rep. 264, 271. The decision in *Tann v. Owen*, Waddilove's Eccl. Cases 108, before Dr. Lushington, June 6th, 1834, is thus reported by Dr. Waddilove: "Church rates were originally confined to the repairs of the church, and to the providing such things as were requisite for the performance of the rites of the church therein. In strictness no other expenses are properly defrayable out of the church rates, although in lapse of time, and with the consent of the majority of a vestry, other expenses, such as the salary of an organist, the repair and tuning of the organ, wages of pew openers, and other objects,—without which it is considered, [§353] especially in the *metropolis, divine service cannot be decently and properly carried on, have been included. But these are expenses which require the sanction of the vestry." [BLACKBURN, J.—I cannot see how the question whether certain things are legally or illegally included in a church rate can depend upon the sanction of the vestry. Though in allowing the accounts of churchwardens this consideration must be useful. COCKBURN, C. J.—If these things are for necessary purposes, they are sanctioned by the common law. Perhaps it may be for the vestry, and not the churchwardens, to determine whether certain things, debateable in themselves, shall be included in the rate. Still the power of the vestry to impose a tax cannot extend beyond the common law rule, which is that the rate must be for the repairs of the church, and for the necessary expenses of the offices of the church. You cannot contend that an item comes within that rule because the vestry vote it.] As to the items "water and gas rates, printing, stationery and contingencies;" water, light and stationery are necessities; printing is required for the poll books; and contingencies (the estimate of all these items together amounting only to 28*l.*), must be nothing. Also it has often been decided that a small objectionable item will not vitiate a rate substantially good; and

here the objection is to an estimate, which it is not necessary should be submitted to the vestry.

Collier and *G. Tayler*, in support of the rule.—The power of making this rate rests entirely on sects. 70 and 71 of stat. 58 G. 3, c. 45, and the question is whether the word "repairs" in those sections means more than what is naturally and ordinarily meant by the word; and if it does, how much more?

*The practice, which has arisen in comparatively modern times, of applying the church rate to other purposes than the repairs of the church and providing things necessary for the performance of divine service has been held by the Ecclesiastical Court to be not lawful without the consent of the vestry: Dr. Lushington, in *Tann v. Owen*, 1 Burn. Eccl. Law, 9th ed., by Phillipps, 388 b, and *Gathercole v. Wade*, Id. 388 a. Therefore there is a difference between repairs and other expenses, and in stat. 58 G. 3, c. 45, sects. 70 and 71, the legislature had that difference in their mind, and used the word "repairs" advisedly, intending to confine the rate to be made under it to the repairs of the fabric. They meant that, where a district was cut off from a parish, the inhabitants should be liable for such repairs only, both in the remaining part of the parish and in the district newly formed. The term "church rates" is used by the legislature in sects. 31, 56 and 57 of stat. 58 G. 3, c. 45, and in sects. 14, 23 and 40 of stat. 59 G. 3, c. 134: and if they had intended to give the power of making a common law church rate, the enactment would have been "that in all such district parishes church rates shall be raised as in other parishes; provided, nevertheless, that for twenty years the said district parishes shall remain also liable to the church rates of the original parishes." The 1st, 2d and 7th articles of the bill, and the estimate, make a distinction between repairs of the church and the expenses of divine service and other charges. The total estimate is 237*l. 1s. 8d.*, to cover which a rate of 2*d.* in the pound was made; whereas a rate of $\frac{1}{2}d.$ in the pound would be more than sufficient for the repairs of the church, the estimate of which is 45*l.*

*The same distinction is observed by the legislature. In the twenty-one Church Building Acts continuing and amending stat. 58 G. 3, c. 45, down to and inclusive of stat. 19 & 20 Vict. c. 104, there is no instance of a common law church rate being called a rate for the repair of the church. Stat. 58 G. 3, c. 45, either leaves the expenses of divine service, &c., in a district church unprovided for, supposing that they will be supplied by voluntary contributions; or those expenses may be paid out of the pew rents, under sects. 26 & 27 of stat. 59 G. 3, c. 134. [COCKBURN, C. J.—I do not see in the Acts any trace of the former alternative.] Sect. 27 directs how the surplus of the pew rents remaining, after payment of the stipend of the minister and the clerk "and other expenses," that is, expenses incident to the office of churchwarden, shall be applied. [They also cited stats. 5 G. 4, c. 103, ss. 5 and 10, 1 & 2 W. 4, c. 38, s. 16, 19 & 20 Vict. c. 104, s. 6.] [BLACKBURN, J.—What the legislature say in subsequent Acts can hardly show the sense in which they used the word "repairs" in stat. 58 G. 3, c. 45. The scheme in stat. 19 & 20 Vict. c. 104, s. 6, is quite different, and it rather tends against the applicant.] This is the case of an ecclesiastical district formed under

sect. 21 of stat. 58 G. 3, c. 45, "for the purpose of affording accommodation for the attending divine service." The distinction between separate ecclesiastical parishes and districts is carefully preserved throughout stat. 58 G. 3, c. 45. [They referred to sects. 16, 19, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32.] The rate on the security of which the Commissioners may advance money for the purchase of a site under sect. 54, is a rate over the whole parish. The rate now in question could not be security for any money lent.

*^{356]} The Court will not give a large construction to the words of an enactment which confers the power of imposing a new burden upon the subject. The inhabitants of the district have to pay a new rate for the repair of their church, and its expenses during twenty years, while they have also to contribute to the expenses of the old church; whereas, if they only pay for the repair of the new and old church, the rate would probably not be more than they were before subject to. [BLACKBURN, J.—How will the expenses of divine service in the parish church be provided for after the expiration of twenty years?] The power to make a common law church rate in the old part of the parish is not taken away: consequently the inhabitants of the old part of the parish remain liable as at common law; the boundary only being altered. [COCKBURN, C. J.—An inhabitant in the old part of the parish might say, The common law imposed the liability on me with other persons, and if they are relieved from it my liability is gone also. WIGHTMAN, J.—Suppose within the twenty years a rate were made for the area of the original parish in the usual form, would the district be liable?] It would not be liable unless the rate was made simply for the repair of the church. [BLACKBURN, J.—Must there then be two rates, one for the repair of the church and the other for the expenses of divine service in the old church? COCKBURN, C. J.—If there are to be two rates it would be only necessary to have said that, at the expiration of the twenty years, the district should not be subject to be rated to the repair of the parish church; whereas the legislature has further said that at the expiration of the twenty years the parish church shall be repaired by so much of the old parish as is left after the district has been taken ^{*from it}. ^{357]} The legislature did not intend to exempt the inhabitants of the old parish from the expenses of divine service.] The last two clauses in sect. 71 are surplusage. As to the inconvenience of two rates, there must be two in the case of money borrowed for the repair of the church. [BLACKBURN, J.—Then there would be added the inconvenience of a third rate.]

In *Chesterton v. Farlar*, 1 Curt. Eccl. Rep. 345, the rate was held bad by the Judicial Committee of the Privy Council as being retrospective: (a) the point now raised was not decided by that Court.

As to the form of the heading of the rate in 1 Burn's Eccl. Law, 9th ed., by Phillimore, 384 b, no authority is cited for it: it is not in Gibson's Codex, tit. ix. c. iv. The heading is not of the essence of the rate; and it has never been decided that any heading is essential. If the word "repairs" is construed to mean more than repairs of the church, it must be confined to expenses which the inhabitants in a common law parish are bound to provide for. Stat. 58 G. 3, c. 45, s.

(a) See *Farlar v. Chesterton*, 2 Moo. P. C. 330.

56, meant to apply to parishes or extra-parochial places mentioned in sect. 52 as contradistinguished from ecclesiastical districts under that Act. [They also referred to sect. 35.] [COCKBURN, C. J.—Surely sect. 56 applies to common parishes also. Suppose a parish in which a new church is wanted.] This rate refers to the salary of an organist and other matters which cannot be allowed without the consent of the vestry. [BLACKBURN, J.—The statute of circumspectè agatis, 13 Edw. 1, st. 4, which enjoined that there should be no prohibition of a suit on account of the church *being uncovered or non de-center ornata, shows that fit church ornaments are legal, and that might, I think, include the salary of an organist.] In *Tann v. Owen*, 1 Burn Eccl. Law, 9th ed., by Phillimore, 388 b, Dr. Lushington held that a large illegal item entirely vitiates the rate. [BLACKBURN, J.—Suppose this was a common law parish, and a common law church rate, is there any item so objectionable as to vitiate the rate?] The item “transcribing registers,” is one which even the consent of the vestry would not render valid. [*Dowdeswell*, contrà.—A register of marriages, christenings, and burials must be kept: stat. 58 G. 3, c. 45, s. 27; and the transcript of all such must be transmitted to the registrar of the diocese: 52 G. 3, c. 146, s. 7.]

Further, according to the true construction of the Church Building Acts, all power of levying the church rate in these district parishes is taken away. Stat. 58 G. 3, c. 45, s. 70, provided for the repairs of district churches by rates to be raised within the district as in the case of repairs of churches by parishes; but that is repealed by stat. 59 G. 8, c. 134, s. 30, by which a select vestry for the care and management of the concerns of the district church and all matters relating thereto is to be appointed by the Commissioners; and such select vestry shall annually elect or appoint the churchwarden to be named on the part of the parish. [BLACKBURN, J.—There is no repeal of stat. 58 G. 3, c. 45, s. 70, either by express words or by implication. The latter enactment is cumulative on the former, and carries it out. You were well advised not to mention this point when the rule was moved for.]

*At any rate the first question is fit to be put upon the record. [*359
Cur. adv. vult.]

WIGHTMAN, J. (Feb. 22d), delivered the judgment of the Court.

This was a rule calling upon the official principal of the Consistorial Court of London, to show cause why a writ of prohibition should not issue against his proceeding in a suit instituted by the churchwardens of the district parish of St. Bartholomew, Sydenham, against Richard Beall for subtraction of church rate.

It appeared the parish of Lewisham, in Kent, was, in 1855, divided into three ecclesiastical districts under the provisions of the 21st section of the 58 G. 3, c. 45, and subject to the other provisions of that and the other Church Building Acts; and that one of such districts was assigned to a church called the Church of St. Bartholomew, built under the provisions of those Acts at Sydenham, and was called the district parish of St. Bartholomew, Sydenham. On the 15th of June, 1860, a rate was made by the churchwardens and other parishioners of the district, “for and towards the repairs of the district parish church of St. Bartholomew, Sydenham.” The rate in form was “for and towards the repairs of the church;” but it appeared that the rate

GALLIARD, Appellant, LAXTON, Respondent. Feb. 22.

Arrest.—Police constable.—Warrant.—Bastardy order.—Withdrawal of information.

1. A police constable who makes an arrest under a warrant from a justice of the peace for disobedience to a bastardy order, is bound to have the warrant in his possession at the time; and this although the warrant was in the possession of his superior officer at the station house, and although the officer making the arrest was not called on to show it.

2. Two informations were laid against a party, one charging him with the rescue of a person out of lawful custody, and the other with an assault on two police constables; but on the party being brought up before the petty sessions, the first of these informations was withdrawn: held, that this was no valid ground of objection to proceeding on the second information.

THIS was a case stated for the opinion of this Court under 20 & 21 Vict. c. 43, s. 2.

On the 3d July, 1861, the two following informations were laid against the appellant before a magistrate of the county of Chester.

"County of Chester, to wit.—The information and *complaint of Charles Laxton, of the township of Nantwich, in the said county of Chester, superintendent of police (the respondent), taken and made upon oath this 3d day of July, in the year of our Lord 1861, before me, the undersigned, Thomas Brook, clerk, one of Her Majesty's justices of the peace in and for the said county, at the township of Wistaston, in the said county of Chester, who saith that he hath just cause to believe and suspect, and doth believe and suspect, that Charles Galliard (the appellant), John Galliard, Louisa Galliard, and Margaret, wife of Charles Galliard, of the township of Monks Coppenhall, in the said county, on the 1st day of July, in the year aforesaid, at the township of Monks Coppenhall aforesaid, whilst one William Galliard was in the lawful custody of one Henry Dyson, a constable, under and by virtue of a warrant under the hand and seal of Thomas Brook, clerk, one of Her Majesty's justices of the peace in and for the said county, for arrears in bastardy, unlawfully, forcibly, and feloniously did rescue the said William Galliard out of the custody of the said Henry Dyson, and him, the said William Galliard, did put at large, to go whithersoever he would, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity; and thereupon this informant prayeth that the said Charles Galliard, John Galliard, Louisa Galliard, and Margaret Galliard, may be apprehended for their said offence, and dealt with according to law.

(Signed)

"CHARLES LAXTON.

THOMAS BROOK."

"Sworn, &c.

County of Chester, to wit.—Be it remembered, that on the 3d day of July, in the year of our Lord 1861, at *Wistaston, in the said county of Chester, Charles Laxton, of Nantwich, in the said county of Chester, superintendent of police, personally cometh before me, Thomas Brook, clerk, the undersigned, one of Her Majesty's justices of the peace in and for the county of Chester, and upon his oath informeth me, upon information received, that Charles Galliard, John Galliard, Louisa Galliard and Margaret, wife of Charles Galliard, of the township of Monks Coppenhall, in the said county of Chester, within the space of three calendar months now last past, to wit on the 1st day of July, 1861, at the township of Monks Coppen-

hall, in the said county of Chester, unlawfully did assault Henry Dyson and John Sharman, of Monks Coppenhall aforesaid, police constables, contrary to the form of the statute in such case made and provided; wherefore the said Charles Laxton prayeth the consideration of me, the said justice, in the premises, and that the said Charles Galliard, John Galliard, Louisa Galliard and Margaret Galliard may be apprehended and brought to appear before me, and answer the premises, and make their defence thereto.

(Signed)

"CHARLES LAXTON.

"Taken and sworn before me, &c.

"THOMAS BROOK."

Upon both of these informations warrants were issued, and the appellant was brought up before the undersigned magistrate on the 5th July, 1861, at a petty session held at Nantwich: when the respondent withdrew the information No. 1, but proceeded with the information No. 2.

It was proved by evidence that a warrant under 7 & 8 Vict. c. 101, s. 3, for arresting William Galliard, the appellant's brother, was issued on the 8th September, 1861, and was as follows:—

"County of Chester, to wit.—To the constable of *the town-
ship of Nantwich, in the county of Chester, and all Her [*366
Majesty's officers of the peace in and for the said county whom these
may concern.—

Whereas information and complaint have been made upon oath before me, Thomas Brook, clerk, one of Her Majesty's justices of the peace for the county of Chester, on the 8th day of September, 1860, by Eliza Lowe, of the township of Nantwich, in the county of Chester, single woman, that by an order made under the authority of the statute passed in the eighth year of the reign of Her present Majesty, intituled 'An Act for the further Amendment of the Law relating to the Poor of England,' at the petty sessions holden in and for the division of the hundred of Nantwich, in the county of Chester, on the 7th day of August, 1860, by Her Majesty's justices of the peace in and for the said county, acting in and for the said division, then and there assembled, William Galliard, of the township of Monks Coppenhall, in the county of Chester, puddler, was adjudged to be the putative father of a bastard child then lately born of her body; and that in and by the said order it was ordered that the said William Galliard should pay to her, the said Eliza Lowe, so long as she should live and should be of sound mind, and should not be in any gaol or prison, or under sentence of transportation, or to such person who might be appointed to have the custody of such bastard child under the provisions of the said statute, the sum of 1s. 6d. per week until such child should attain the age of thirteen years, or should die, or she the said mother should marry, and the sum of 5s. for the midwife, and the sum of 2l. 4s. for the costs incurred in the obtaining such order; and that the said William Galliard hath had due notice of *the said order; [*367 and that the said bastard child is now living, under the age of thirteen years; and that she, the said mother, hath not been married since the said order was made; and that the payments directed to be made by the said order have not been made according thereto by the said William Galliard, and that there is now an arrear for the same

the sum of 19*s.* 6*d.*, being the amount of arrears for thirteen weeks' payments, and 5*s.* for the midwife, and the sum of 2*l.* 4*s.* for the costs incurred in the obtaining such order; these are therefore, in Her Majesty's name, to command you, the said constable or other officer of the peace, or some or one of you, forthwith to apprehend the said William Galliard and convey him before two of Her Majesty's justices of the peace in and for the said county of Chester, to answer the premises, and to be dealt with according to law.

"Given under my hand and seal, at the township of Nantwich, in the county of Chester, this 8th day of September, 1860.

(Signed), "THOMAS BROOK"

This warrant was given to the superintendent of police, and by him given to the police at Monks Coppenhall, and it had been for a time in the possession of police constable Dyson. On the night of the first July, police constables Dyson and Sharman, being on duty in uniform as constables, in Monks Coppenhall, arrested the appellant's brother, William Galliard, under the warrant dated the 8th September, 1860, but they had not the warrant in their possession at the time, it being then at the station-house in Monks Coppenhall, in the possession of their superior officer, Inspector Wilson.

After the respondent's witnesses had been examined, the attorney *368] for the appellant took the following *objections—first, that the arrest was illegal, the warrant of the 8th September, 1860, not being in the possession of the police constables when the arrest took place; secondly, that the respondent, having withdrawn the charge of rescue, could not proceed with that for the assault, as the lesser offence merged in the greater one; and that the withdrawal amounted to an acquittal, on the principle of *autrefois acquit*, and that he could not be retried for the same offence.

The justices were satisfied that the assault had been committed, and that the objections were not tenable, and convicted the defendant in 5*l.*, including costs, and in default to be committed to Chester Gaol for two months.

The questions submitted for the opinion of this Court were:

First, whether, the warrant of the 8th September, 1860, having been issued in the form above set forth, and being in the hands of the police, an inferior officer of the same force, not having the warrant in his actual possession at the time of the arrest, was legally justified in arresting William Galliard.

Secondly, whether the information No. 1 being withdrawn amounted to such a trial and acquittal that the appellant could not be tried on the information No. 2.

The case was argued, on the 14th February, before Wightman and Crompton, JJ.

Gibbons, for the appellant.—The first question is whether, when a police constable arrests a person under a warrant, he is bound to have the warrant with him at the time. This precise point does not seem to have ever arisen before; but there are authorities which show in-*369] directly that he is. In Dalton **on Sheriffs*, c. 22, p. 110, ed. 1682, the law is thus laid down: "A known and sworn officer (be he sheriff, under-sheriff, bailiff, or serjeant) needs not to show his warrant or writ, when he cometh to serve it upon any man's person,

or goods, although the party demandeth it: but a special bailiff, or other person who is no sworn and known officer, must show their warrant to the party, if he demands it, or otherwise the party may make resistance, and needs not to obey it." Lambard also, in his *Eirenarcha*, book 2, ch. 6, pp. 188-9, ed. 1610, speaks of the bailiff who has a warrant to arrest on suspicion of felony as *serving* the warrant. The officer could not "serve" the warrant, or show it to the party, or declare its contents to him, unless it was in his actual possession; whereas, here, it was not only not in his possession, but was at the station-house under the control of his superior officer. [WIGHTMAN, J.—He might have read it before. Besides, it does not appear that he was called on to show it.] Request to show the warrant should be presumed. The practice in civil cases affords an analogy; where the usage is for the bailiff to have his warrant with him, as appears from *Robins v. Hender*, 3 Dowl. P. C. 543. [WIGHTMAN, J.—I am not sure of that. In *Robins v. Hender* there was no arrest made.] In *Fownes v. Stokes*, 4 Dowl. P. C. 125, an application was made to discharge a party on the ground, among others, that at the time of his arrest the officer had not the warrant in his possession. [WIGHTMAN, J.—There the Court did not discharge the arrested party.] Broadfoot's Case, Foet. 154, and Dixon's Case, 1 East, P. C. c. 5, s. 80, p. 313, are authorities that the same practice holds in case of impressment for the naval service. [CROMPTON, J.—In those cases the parties making the *arrest were not authorized to do so by [*370 their warrant.] In *Rex v. Whalley*, 7 C. & P. 245 (E. C. L. R. vol. 32), where Commissioners of bankrupts issued a warrant to apprehend a bankrupt, directed to certain persons by name and their assistants, it was held that the warrant did not justify the apprehension of the bankrupt by a person who was not in presence, either actual or constructive, of those named in the warrant, although he had at the moment the warrant in his possession. In *Rex v. Patience*, 7 C. & P. 775 (E. C. L. R. vol. 32), where a constable had a warrant to apprehend a party, and employed his sons to take him, who, the father being in sight at about a quarter of a mile off, proceeded to arrest him, it was held by Parke, B., that the arrest was illegal. [WIGHTMAN, J.—There the warrant was not addressed to the person making the arrest.] [He also cited *Hooper v. Lane*, 6 H. L. Ca. 448, and *Cook v. Nethercote*, 6 C. & P. 741 (E. C. L. R. vol. 25.)]

Secondly, the first information having been withdrawn, the defendant was not liable to be tried on the second. [He cited *Tunnicliffe v. Tedd*, 5 C. B. 553 (E. C. L. R. vol. 57).] [CROMPTON, J.—Withdrawing an information is not like an acquittal. WIGHTMAN, J.—That case did not decide this point. Suppose the Attorney-General had entered a nolle prosequi.]

No counsel appeared on the other side.

Cur. adv. vult.

The judgment of the Court was now delivered by

WIGHTMAN, J.—The first question proposed to us is of much general importance, inasmuch as it may arise in cases where resistance to an arrest may be carried to the extent of wounding or even killing the officer.

*It appears that a warrant had been made by a magistrate for the county of Chester, directed "To the constable of the

[*371]

township of Nantwich, in the county of Chester, and all Her Majesty's officers of the peace in and for the said county;" commanding them or some or one of them forthwith to apprehend William Galliard, and convey him before two justices of the county of Chester, to answer for not obeying a bastardy order for payment of money. This order is stated to have been given to the superintendent of police, and by him to have been given to the police at Monks Coppenhall in the county of Chester (of which place William Galliard is stated in the warrant to be); and it had subsequently been in the possession of Dyson, one of the police constables who arrested William Galliard; but he had it not with him at the time he made the arrest, it being then at the station-house at Monks Coppenhall, in the actual possession of the superintendent of police there. On the night of the 1st of July last, Dyson, with another police constable of the county, arrested William Galliard under the warrant, but did not produce it, nor were they asked to produce it; and the question is whether, to make the arrest legal, they must at the time have had the warrant with them, ready to have been produced if necessary.

The warrant is not addressed to any officer by name, but to the constable of Nantwich and all the peace officers of the county generally, and this general form of direction seems to be warranted by the 5 G. 4, c. 18, s. 6, and Dyson and the other policeman both came within the description of the persons to whom it is addressed. We are not told what words were used by the officers at the time they made the arrest, but as no point seems to have been raised upon *any omission to inform William Galliard of the nature of the charge, it may be presumed that they did tell him, not only that they arrested him under the warrant, but what the charge was. As they were obviously police constables, we think that they were not bound in the first instance to produce the warrant at the time they made the arrest, but that as this was not a charge of felony, but rather in the nature of a civil than of a criminal proceeding, the warrant ought to have been produced, if required, and that an arrest without such production would not be legal. The production of the warrant was not however required before or at the time that the arrest was made, notwithstanding the resistance of the appellant and his brother, nor indeed at any time; and as the warrant was in existence at the station-house, where no doubt it could readily have been procured, it may be said that there was no reason for its being in the hands or the pocket of one of the officers, and no disadvantage to the person arrested by reason of its not being there. That no doubt may be so under the circumstances which occurred in this case; but suppose it had happened that, after the arrest had been effected in spite of the resistance made, and before the appellant's brother had been taken to the station-house where the warrant was, he had requested the officers to produce it, which, not having it, they could not do, how would the case have stood then? We have already expressed our opinion that, if requested, the officers were bound to produce the warrant, and if so, the keeping him in custody *after* such request and non-compliance would not be legal, and it could hardly be contended that the arrest itself would be legal though the detention, under the circumstances

above supposed, would be illegal; and in *this view of the case [*[#373] it appears to us that the officers were bound to have the warrant ready to be produced if required, and that, if they had it not, the arrest would not be legal. If an action had been brought against the officers for making the arrest, and they had pleaded a plea of justification under the warrant, they must, according to all the precedents, have pleaded that it was delivered to them to be executed; and though it is not stated in the precedents that they had actual possession at the time of the arrest, it is to be presumed from the allegation of delivery to them, that they continued to hold it. Mackalley's Case, 9 Co. 65 b, is distinguishable, on the ground suggested by Mr. East in his Treatise on Pleas of the Crown, vol. 1, p. 319, citing 1 Hale P. C. 458; and, indeed, we are unable to find any case in which the precise point raised for our consideration has been decided: but we are, upon the whole, of opinion that the officers making the arrest ought to have had the warrant with them ready to be produced in case it should be required, and that, not having it, they were not justified in making the arrest.

As to the second point, we are clearly of opinion that the withdrawing the information for a rescue afforded no valid ground of objection to the proceeding on the information for an assault.

Conviction quashed.

***BRAY, Appellant, SOMER, Respondent. Feb. 22.** [*[#374]

Churchwarden.—Continuance in office.—Signing jury lists.—6 G. 4, c. 50.—5 & 6 W. 4, c. 62, s. 9.

1. An outgoing churchwarden, whose year of office has expired, continues in office until his successor is not only elected, but has made the declaration substituted for the oath by stat. 5 & 6 W. 4, c. 62, s. 9.

2. So held upon an information for not signing the jury lists pursuant to stat. 6 G. 4, c. 50.

CASE stated pursuant to stat. 20 & 21 Vict. c. 43, s. 2. Upon an information preferred before three justices of the county of Cornwall by James Somer, the high constable of the hundred of Lesnewth, against William Bray, for that he had, as churchwarden of the parish of Treneglos, in the said county, neglected to sign the list of jurors for the said parish for the year 1861, the defendant was convicted and adjudged to pay a fine of 5*l.*

The defendant having, on the 30th September, 1861, appeared upon summons to answer to the information, it was proved, on the part of the complainant, that William Bray was in the year 1857 duly elected churchwarden for the parish of Treneglos, and subscribed the statutory declaration for performing the duties of the office; that in the year 1858, and again in 1859, he was similarly elected, and on each of the two last-mentioned occasions again subscribed the declaration when accepting office; that in the year 1860 Richard Chapman, a person liable to serve the office of churchwarden for Treneglos, was duly elected churchwarden of that parish, but did not subscribe the statutory declaration for performing his duties as churchwarden, and that

*375] he had not in fact performed such duties; that, except *as aforesaid, no person had, since Easter 1859, been elected into and accepted the office of churchwarden for Trenglos; and that William Bray had not done any official act since the expiration of the year 1859-60, and had at all times subsequently refused to do any act as churchwarden, contending that he was not bound to fill the office of churchwarden longer than during the one year for which he was last elected. Whereupon the justices (knowing the great importance of the jury lists to the due administration of justice, and that such lists could not be received and certified by them as true lists of all such persons within the respective parishes of the division of Lessnewth, in the said county, as were by law liable to serve on juries, unless such lists were attested and subscribed by those officers who are required by stat. 6 G. 4, c. 50, to attend and subscribe the same) did adjudge and determine that William Bray was still a churchwarden for the parish, and was bound to act as such until his successor should be appointed and duly qualified by subscribing the proper declaration, and that he, William Bray, ought to have signed the jury list.

If the Court should be of opinion that William Bray was bound to sign the said jury list, according to stat. 6 G. 4, c. 50, then the conviction should be confirmed. But if the Court should be of a contrary opinion, then the conviction should be quashed.

The case was argued on February 15th and 17th, before Wightman and Crompton, JJ.

Walter Smith, for the respondent.—The question is, whether the appellant continued in the office of churchwarden so as to be bound *376] to sign the jury list, his *successor, though duly elected, not having made the declaration substituted for the oath by stat. 5 & 6 W. 4, c. 62, s. 9. The general rule is that an annual officer continues in office until his successor is elected and sworn: *Foot v. Prowse*, 1 Str. 625, per King, C. J. And by canon 118 of the canons of 1603,(a) "The office of all churchwardens and sidemen shall be reputed ever hereafter to continue until the new churchwardens that shall succeed them, be sworn;" and they are directed to perform the duty of exhibiting their presentments "before the newly-chosen churchwardens and sidemen be sworn." By canon 89,(b) indeed, the churchwardens or questmen shall not continue "any longer than one year in that office, except perhaps they be chosen again in like manner;" but in 1 Burn's *Eccl. Law*, 9th ed., by Phillimore, p. 409, tit. *Churchwardens [and Vestry]*, after citing this canon, it is added, "For although, in some places, there is but one new churchwarden yearly elected (he who was junior churchwarden before being continued of course); yet in that case the books of common law, as well as the canon, suppose a new election to be made of both." [WIGHTMAN, J.—The two canons are not inconsistent.] The oath of office(c) related almost exclusively to ecclesiastical matters. In an anonymous case cited in 1 *Ventr.* 267, "The Court said, that it has been resolved, That he may execute his office before he is sworn, though it is convenient he should be sworn;" but, in *The King v. The Inhabitants of Whitchurch*, 7 B. & C. 573,

(a) 2 Gibs. Cod. tit. xlii. c. 3, p. 962, 2d ed.

(b) 1 Gibs. Cod. tit. ix. c. xv. p. 215, 2d ed.

(c) 1 Gibs. Cod. tit. ix. c. xv. p. 216, note (=) to canon 118, 2d ed.

584 (E. C. L. R. vol. 14), Littledale, J., observed, "Upon the question whether a churchwarden can lawfully do any act before he is actually sworn into office, I entertain *some doubt. That matter was not fully discussed in the case cited from Ventris." In *The King v. Marsh*, 5 A. & E. 468 (E. C. L. R. vol. 31), service of notice on a person who continued to do the duties of the office of churchwarden of a tithing after the year of his office had expired, because his successor, though elected, had not been sworn in or acted, was held valid under sect. 3 of The General Enclosure Act, 41 G. 3, c. 109, which requires the notice to be served upon "one of the churchwardens or overseers of the poor of the respective parishes." [He referred to the observations of Lord Denman and Littledale, J., in that case, p. 476, and also cited *Garsington v. The Holy Trinity in Oxford*, cited in *Burr. S. C. 30*, 240.] Therefore election alone does not put a man into the office of churchwarden. [WIGHTMAN, J.—For some purposes it does not do so; but the question is, whether it does not for lay duties imposed by Act of Parliament. There may be a difference as to this between ecclesiastical and legal matters. CROMPTON, J.—The old churchwardens may make church rates until the new churchwardens are chosen.] In Rogers's Eccl. Law, p. 245, 2d ed., it is said of the newly-elected churchwardens that "till sworn, they can do no legal act as churchwardens, although they served the office the former year, for they are chosen or sworn but for one year. Prideaux 68; Gibs. Cod. 215, and *vide* 1 Vent. 267." Sect. 9 of stat. 5 & 6 W. 4, c. 62, after reciting that "persons serving the offices of churchwarden and sidesman are at present required to take an oath of office before entering upon the execution thereof, and also an oath on quitting such office," enacts "that in future every person *entering upon the office of churchwarden or sidesman, before beginning to discharge the duties thereof, shall, in lieu of such oath of office, make and subscribe a declaration that he will faithfully and diligently perform the duties of his office;" and the oath on quitting office is abolished. This enactment is in confirmation of the 118th canon, and shows that the person elected is not in office before he has made the declaration. [WIGHTMAN, J.—It does not show that he could not act before making the declaration.] There cannot be a hiatus between the old churchwardens quitting office and the new churchwardens coming in, because, by stat. 59 G. 3, c. 12, s. 17, the parish property is vested in the churchwardens and overseers, and it remains in the old churchwardens until the new churchwardens make the declaration. [He cited *Woodcock v. Gibson*, 4 B. & C. 462 (E. C. L. R. vol. 10).] [WIGHTMAN, J.—But in *Garsington v. The Holy Trinity of Oxford*, cited in *Burr. S. C. 30*, 240, the swearing in of a tithing-man related back to the time of his election to the office. Is there any mode of compelling the man who has been chosen as successor to make the declaration?] He might have been excommunicated for refusing to take the oath: Rogers's Eccl. Law 245, 2d ed.; and, if a parishioner liable to serve the office of churchwarden is chosen, he may be compelled to serve by citation in the Ecclesiastical Court: *Cooper v. Allnutt*, 3 Phibl. Eccl. Rep. 165. And the archdeacon may be compelled by mandamus to administer the declaration: *Anon.*, 1 Ventr. 267.

Collier, for the appellant.—As soon as the new churchwarden is elected he is in the office, and may perform the duties of it. The making of the declaration *is not a condition precedent, otherwise his predecessor might be burdened with the office for life, if the parishioners chose persons who would not qualify. In *The King v. The Inhabitants of Corfe Mullen*, 1 B. & Ad. 211 (E. C. L. R. vol. 20), where the question was whether a man had gained a settlement by serving the office of tithingman, Bayley, J., in delivering the judgment of the Court, said, p. 218, "There can be no question that he executed the office *de facto*, nor, indeed, can there be any that, for some purposes at least, he executed it *de jure*. Swearing in may be rendered necessary either to enable the party to serve the office, or to impose a greater sanction on his discharge of it. We think, in this case, the latter is the object;" and the anonymous case in 1 Ventr. 267 is recognised. [CROMPTON, J.—The distinction taken by Bayley, J., there was that in the case of a person in the office *de facto* his acts were good; here the question is whether election alone makes a man in the office *de facto*. WIGHTMAN, J.—Suppose the precept under stat. 6 G. 4, c. 50, had been sent to Chapman, it would have been no answer for him to say, "I have not made the declaration;" the reply would be, "You have been elected;" he could not, in order to get rid of an onerous duty imposed upon him, say that he did not choose to make the declaration.] There has been a valid election of a successor; and it is for the parishioners to make him do his duty. It is for the persons wishing the jury list to be signed to call upon Chapman to make the required declaration and sign that list.

Walter Smith, in reply.—The legality of the acts of the churchwarden before he had taken the oath was not in question in *The King v. The Inhabitants of Whitchurch*, 7 B. & C. 573 (E. C. L. R. vol. 14), and the dictum of King, C. J., in *Foot v. Prowse*, 1 Str. 625, was extrajudicial; nor was it necessary to refer to the case of a churchwarden in *The King v. The Inhabitants of Corfe Mullen*, 1 B. & Ad. 211 (E. C. L. R. vol. 20). [CROMPTON, J.—In the latter case, the question being whether a pauper had gained a settlement by serving the office of tithingman, it appeared that he had executed the office, and therefore was tithingman *de facto*.] Here the person elected may have good reason for not making the declaration. [WIGHTMAN, J.—The case finds that he is a fit person to serve the office of churchwarden, and qualified in all respects except making the declaration. What is the effect of making the declaration?] The persons chosen are churchwardens from that time, and not before. [WIGHTMAN, J.—Suppose a churchwarden does not make the declaration until a month before he goes out of office.] He will only have been churchwarden for a month. [WIGHTMAN, J.—And yet it is an annual office. Suppose Chapman now makes the declaration, does his year of office date from the time of making the declaration?] In Cripps's Ecc. Law, 190, 3d ed., it is said that the churchwardens are to appear to be sworn into their office at the next visitation after their election, "and until they are so sworn they can do no legal act; but the old churchwardens continue in office until the new ones are sworn: and even if the old churchwardens should be re-elected, they must still be resworn." [CROMPTON, J.—Suppose a new churchwarden drops

down dead before he has had time to make the declaration, it would be convenient that the old churchwarden should remain in office until a new election.]

Cur. adv. vult.

*WIGHTMAN, J. (Feb. 22), delivered the judgment of the Court. [*381]

The case of the appellant,—in being obliged to continue in the office of churchwarden, because a successor duly elected and otherwise qualified refuses to be sworn or to make the substituted declaration,—appears a case of so much hardship, that we should have been well disposed to have given judgment in his favour, if we could have done so consistently with the authorities.

The question is, whether the outgoing churchwarden, whose year of office has expired, may be considered as continuing in office until his successor is not only elected, but sworn, or has made the substituted declaration.

The 118th canon says, "the office of all churchwardens and sidemen shall be reputed ever hereafter to continue until the new churchwardens, that shall succeed them, be sworn." The necessity for swearing a churchwarden in order to enable him to act *de jure*, is recognised by several authorities in the Courts of law as well as in the ecclesiastical Courts. In an anonymous case reported in 1 Ventr. 267, it is said that a churchwarden may act before he is sworn; but that is the only case of which we are aware to the same effect, and its authority upon this point is greatly weakened by the observations of Lord Denman and Littledale, J., in *The King v. Marsh*, 5 A. & E. 468, 476 (E. C. L. R. vol. 31). In the case of *Foot v. Prowse*, 1 Str. 625, King, C. J., compared the case of aldermen, who are annually elected, to the case of constables and other annual officers, "who are good officers after the year is out, until another is elected and sworn." In *The King v. The Inhabitants of Whitchurch*, 7 B. & C. 573 (E. C. L. R. vol. 14), it was held by the Court that, in favour of an ancient certificate purporting to be made by a churchwarden, they would presume that he was sworn before he made it, apparently considering that taking the oath was necessary to make him churchwarden *de jure*: and we may observe further that, by the 54 Geo. 3, c. 107, s. 1, it is enacted, "that indentures for binding poor apprentices executed by persons acting as churchwardens of a township, hamlet, or chapelry, shall be deemed as good as if the same had been executed by persons actually sworn into the office of churchwarden of such township, hamlet, or chapelry; Provided always, that such persons shall have been duly sworn into the office of churchwarden of the parish wherein the township, hamlet or chapelry, binding such poor apprentice be contained, or into the office of churchwarden of such township, hamlet or chapelry. In this enactment, the Legislature appears to have considered that it was a necessary qualification for a churchwarden, to enable him to do the acts specified, that he should be sworn either as churchwarden of the parish, or of the township, hamlet, or chapelry. It is not necessary to decide, in this case, whether if Chapman had acted in the office of churchwarden his acts might have been valid as being those of a churchwarden *de facto*; but he never acted in any way, or took upon himself the office, and, not having been sworn or made the declaration, it would appear

from the authorities that he cannot be a churchwarden *de jure*. It therefore would seem to follow, that Bray may be considered to continue in the office, as no successor has been sworn, or done any act which would make him a churchwarden.

We think therefore that we cannot relieve the appellant, and that in point of strict law he was bound to have signed the jury list.

Conviction affirmed without costs.

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***LITTLE v. PHILPOTTS. Feb. 22.**

Reg. Gen. Hil. 2 W. 4, r. 93.—Costs.—Set-off.—Attorneys' lien.

After verdict a rule nisi for a new trial was granted; and on the hearing, the cause and another cause between the same parties then pending in a county court, and all matters in difference between the parties to those causes, were by consent referred to a barrister, the costs of the causes respectively, and of the rule, to abide the event, and the costs of the reference and the award to be in the discretion of the arbitrator; the attorney for the plaintiff in both actions being the same. The arbitrator decided the cause in this Court in favour of the defendant, and the cause in the county court in favour of the plaintiff, with damages 45*l.* 10*s.* 6*d.*, and gave the plaintiff the costs of the reference, and divided the costs of his award: Held that, under Reg. Gen. Hil. 2 W. 4, r. 93, the costs of the cause in this Court, and of the rule, could not be set off against the money and costs payable to the plaintiff in the other cause, to the prejudice of the lien of the plaintiff's attorney, as they were not "interlocutory costs in the same suit, awarded to the adverse party," within the proviso to that rule.

A VERDICT having been obtained for the plaintiff in this cause, a rule nisi for a new trial was granted. On the hearing, this Court, by consent, set aside the verdict, and ordered that the cause, and another cause of Little and Williams against the same defendant, then pending in the county court of Carmarthen, and all matters in difference between the parties to these causes, and each of them, should be referred to a barrister; the costs of the causes respectively, and of the rule, to abide the event; and the costs of the reference and the award to be in the discretion of the arbitrator.

The arbitrator by his award decided the cause of Little *v.* Philpotts in favour of the defendant. He decided the cause of Little and Williams *v.* Philpotts, in favour of the plaintiffs, with 45*l.* 10*s.* 6*d.* damages. And he found that there are no other matters in difference between the parties. He gave to Little and Williams the costs of the reference, and divided the costs of his award.

The award provided that, if Little and Williams in the first instance paid the whole or more than one-half of *the costs of the award, then Philpotts should repay to them so much of the amount as exceeded the half of the costs; and that, if Philpotts in the first instance paid the whole or more than one-half of the costs of the award, then that Little and Williams should repay to him so much of the amount as exceeded the half of the costs.

In an affidavit by the defendant in the cause in this Court, it was stated, in substance, that although the action was brought by Little alone it really was the action of Williams also. It was also stated that there was no chance of getting anything from the plaintiff. There was no affidavit on the part of the plaintiff to contradict either of these statements. The attorney for the plaintiff in both actions was the same.

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In Michaelmas term, 1861,

Quain obtained a rule calling upon the plaintiff to show cause why the costs of the cause in this Court, and of the rule, should not be set off against the money and costs payable to Little and Williams, which they were entitled to receive from the defendant under the award of the arbitrator.

In the same Term, Nov. 25th,

Woollett showed cause.—The question is whether, when two actions are referred together with all matters in difference, and the costs to abide the event, and in one of the actions there is no cause of complaint, the judgments can be set off without regard to the lien of the plaintiff's attorney for his costs. The fact of the two actions being in Courts having separate jurisdictions makes no difference. By Reg. Gen. Hil. 2 W. 4, rule 93 (see 3 B. & Ad. 388 (E. C. L. R. vol. 23)), "No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit *against which the set-off is sought, provided, nevertheless, that [*385 interlocutory costs in the same suit, awarded to the adverse party may be deducted." *Cowell v. Betteley*, 10 Bing. 432, (a) decided that the Rule of Court applied to causes referred to an arbitrator. *Tindal*, C. J., said, 10 Bing. 433, "It is unnecessary to decide whether the arbitrator had or had not authority to order this set-off as between the parties to the two causes. The question is, whether the *jus tertii* of the attorney is to be governed by the act of the arbitrator, contrary to the express provision of a rule of Court,—in other words, whether we shall put such a construction on the award of the arbitrator as will defeat the rule of Court. If there had been no arbitration, the parties could not, by their own agreement, divest the attorney of his lien on the judgment; neither can they by referring to arbitration." In *Simpson v. Lamb*, 7 E. & B. 84 (E. C. L. R. vol. 90), upon an application to set off one judgment against another, this Court, in the exercise of its equitable jurisdiction, held that the right of set-off was subject not only to the attorney's lien for costs, but to any equitable rights acquired in the judgment. In *Dunn v. West*, 10 C. B. 420 (E. C. L. R. vol. 70), which will be relied on by the other side, the plaintiff having become bankrupt, his assets had passed to the assignees, and the application was made by the attorney to enforce his lien against the plaintiff and his assignees and the defendant.

Quain, in support of the rule.—Reg. Gen. H. 2 W. 4, r. 93, has no application here; it applies only to the set-off of damages or costs between the same parties in different suits: *Scott v. Count de Richebourg*, 11 C. B. 447, 451 (E. C. L. R. 73), per **Jervis*, C. J. [*386 Here the parties to the action in this Court and to the plaint in the county Court are not the same. A plaint in a county Court is not a suit within the meaning of Reg. Gen. H. 2 W. 4, r. 93. Moreover, that rule only "applies to cases where there is a cross claim for costs in separate actions": *George v. Elston*, 1 Bing. N. C. 513, 515 (E. C. L. R. vol. 27), 3 Dowl. P. C. 419, per *Tindal*, C. J. Here the order of reference referring the two actions rendered the whole of the cross claims one transaction, as in *Figes v. Adams*, 4 Taunt. 632; and

(a) S. C. 4 Moo. & S. 265; 2 Dowl. P. C. 780.

the order is drawn up in one suit. [COCKBURN, C. J.—It was the intention to treat the action and the plaint as two actions, and amalgamate them.] The reference treats both as one action, with separate issues; and then the costs of the two actions and of the rule become interlocutory costs, which by the proviso to Reg. Gen. H. 2 W. 4, r. 93, may be set off without regard to the attorney's lien. In *Scott v. Count de Richebourg*, 11 C. B. 447, it was held that costs of issues in fact found for the plaintiff, and costs of a judgment on demurrer given for the defendant in the same suit, were interlocutory costs within the meaning of that proviso. In *George v. Elston*, there was, as there is here, an affidavit that the plaintiff was unable to pay the costs, and yet the Court refused to regard the attorney's lien. When *Cowell v. Betteley*, 10 Bing. 482 (E. C. L. R. vol. 25), 4 Moo. & S. 265, 2 Dowl. P. C. 280, was decided, *George v. Elston* had not been reported, and it was not brought to the attention of the Court that the two actions referred were in effect one. The decision in that case is explained by Maule, J., in *Dunn v. West*, 10 C. B. 420. During the [argument he said, p. 428, "The report in 4 Moore * & Scott 265, #387] shows the ground upon which the Court proceeded, viz., that although the parties might have bound themselves, so as to give the arbitrator power, as between them, to set off the costs, they could not by their agreement defeat the lien of the attorney": and in his judgment he added, p. 428, "If an action were brought in the name of the plaintiff upon this award, and a set-off were pleaded in respect of the costs in question, could the attorney's lien be set up by way of replication? Clearly not: and, if so, I do not see how we can in this way enforce the attorney's claim. . . . The case is distinguishable from *Cowell v. Betteley*, upon the grounds stated." [BLACKBURN, J.—The Court treated it as an application by the attorney; and Jervis, C. J., said, p. 427, "Now, it is to be observed that the application is made, not by Dunn, the party to whom the money was directed by the award to be paid, but by Dunn's attorneys, who claim a lien upon it for costs."] At any rate the lien of the attorney is only effectual so far as the costs of the plaint.

Cur. adv. vult.

WIGHTMAN, J. (Feb. 22d), delivered the judgment of the Court. After stating the facts as set forth in p. 383, his lordship proceeded:

Mr. Quain obtained a rule nisi to set off, against the money and costs payable to Little and Williams, the costs of the cause in this Court, and of the rule, to which the defendant is entitled, as the arbitrator has decided the event in his favour. Enough appears on the defendant's affidavit (when uncontradicted by the other side) to lead us to the conclusion that, though the action in this Court was in the name of Little alone, it really was the action of Little and Williams [#388] as much as that in the *County Court; so that no objection arises to the set-off on the ground that the parties are not the same, and indeed no such objection was raised before us. Mr. Woollett, who showed cause, did not object to the set-off as between the parties, but insisted that it could not be allowed to the prejudice of the lien of the plaintiffs' attorney. The whole question depends upon the effect of the general rule of Court, originally made in Hilary Term, 2 W. 4, and re-enacted in the same words down to the present time. By that rule "no set-off of damages or costs between parties shall

be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party may be deducted."

Mr. Quain's argument was, adopting the words of Mansfield, C. J., in *Figes v. Adams*, 4 Taunt. 632, 634, that "the rule of reference renders the whole of the cross demands, as it were, one transaction," and he contended that, viewing it in this light, the several sets of costs must be considered as "interlocutory costs in the same suit, awarded to the adverse party," within the meaning of the proviso in the rule. This, however, we think is not the case. Under this award, as the facts are, the defendant has nothing given to him by the arbitrator. If the defendant had taken up the award, and disbursed the whole costs of the award in the first instance (which he appears not to have done), he would have had a right to obtain under the award half of those costs, and would have had something given him by the arbitrator; but, as it is, he gets nothing except the costs of the cause in this Court and of the rule. These were taken out of the discretion of the arbitrator, and are made to abide the *event; that event [*389] has been determined by the award in favour of the defendant, but the costs are not given to him by the award. It is unnecessary to say what in our opinion would be the case if the arbitrator, having power to award different sets of costs according to his judgment, had by his award given some to one party and some to the other. The present case is one where different causes are referred to one arbitrator, the costs of each cause to abide the event; and, in such a case, we are concluded by authority, and are bound not to set off the several costs to the prejudice of the attorney's lien.

In *Domett v. Helyer*, 2 Dowl. P. C. 540, Erle, for the applicant, took the very point, and "submitted that as both judgments" in that case, "arose out of one award, it might be an exception" to the general rule of Court (then very recently made); but Patteson, J., sitting in the Bail Court, refused to set off the one judgment against the other, "except on the condition of satisfying the attorney's lien." In *Cowell v. Betteley*, 10 Bing. 432 (E. C. L. R. vol. 25), 4 Moo. & S. 265; 2 Dowl. P. C. 780, the Court of Common Pleas came to a similar decision, Tindal, C. J., saying that the rule of Court was calculated to embrace causes referred as well as causes which are pursued to their legal result. In *Caddell v. Smart*, 4 Dowl. P. C. 760, the Court of Exchequer came to a similar decision, though the report does not state the reasons assigned by them. We have therefore the whole of the three Courts putting the same construction on the rule of Court within a very short period after it was made, and we find no decision the other way.

Mr. Quain, in his argument, relied much on *Dunn *v. West*, [390] 10 C. B. 420 (E. C. L. R. vol. 70), but, on examination, that case is no authority in his favour. There the plaintiff had become bankrupt. Before his bankruptcy the defendant had made payment of the balance due to the plaintiff, after deducting the amount awarded to the defendant. The plaintiff's attorneys obtained a rule "calling upon the plaintiff and his assignees, and also upon the defendant, to show cause why the defendant should not pay to them (the plaintiff's

attorneys) the balance." Mr. Quain, in arguing, took it for granted that the application must have been made in the name of the plaintiff, though for the benefit of the attorneys, but, as is obvious from the terms of the rule just cited, it was an application by the attorneys to enforce their lien against both parties. There is a very marked difference between such a case and those to which the rule of Court is applicable. Where the equitable interposition of the Court is required by a party to set off one set of costs or damages against another, then the Court may properly attach equitable conditions on the party asking for its equitable interposition. The general rule of Court decides what one of those conditions should be, and so long as that rule of Court remains unrepealed, the Court must withhold its interposition, unless the adversary's attorney's lien in the suit is saved; but where the attorney himself is the applicant, as he was in *Dunn v. West*, he must show affirmatively some ground on which the Court should interfere in his favour. This distinction is expressed by Maule, J., both in *Dunn v. West*, and in *Scott v. Count De Richebourg*, 11 C. B. 447, 449 (E. C. L. R. vol. 73); and it will be found that each Judge in *Dunn v. West* bases his judgment on the ground that the Court had no authority to interfere for the attorney as they were asked to do.

*^{391]} The rule in the present case, therefore, can only be made absolute on the terms that it be without prejudice to the attorney's lien, for his costs in the plaint, so far as regards the set-off against the costs of the plaint, and for his costs in the reference, so far as regards the set-off against the sum awarded, and the plaintiff's costs of the reference. It may be made absolute on these terms, but as the opposition to the rule has been occasioned by the defendant demanding too much, it must be on the terms that the costs of this rule be borne by the defendant. If the defendant does not within a week intimate at the Rule Office his election to make the rule absolute on those terms, it must be discharged with costs.

Rule accordingly.

The QUEEN v. The INHABITANTS of the Borough of LEOMINSTER. Feb. 22.

Order of removal.—Service by post.—Sunday.—4 & 5 W. 4, c. 76, s. 79.—29 Car. 2, c. 7, s. 6.

By stat. 4 & 5 W. 4, c. 76, s. 79, no pauper shall be removed under any order of removal until twenty-one days after a notice of chargeability, accompanied by a copy of the order and of the examination, shall have been sent "by post or otherwise," by the overseers of the parish obtaining the order, to the overseers of the parish to whom the order is directed. Held that, admitting that the delivery of those documents in the ordinary manner would be service of an order or process within stat. 29 Car. 2, c. 7, s. 6, the transmission of them by post under sect. 79 of stat. 4 & 5 W. 4, c. 76, where, by the ordinary course of post, they reached on Sunday the hands of the overseers of the parish to whom the order was directed, was not void by stat. 29 Car. 2, c. 7, s. 6.

UPON appeal, at the Michaelmas Quarter Sessions for the county of Stafford, in 1860, against an order for the removal of Rose Scarlett, the widow of Edward Scarlett, and her three children, from the parish of Sedgley, in the said county, to the borough of Leominster, in the

county of Hereford, the Quarter Sessions confirmed the order, subject to the opinion of this Court, on the following case.

*The overseers and churchwardens of the respondent parish of Sedgley sent to the churchwardens and overseers of the appellant borough of Leominster the notice of the pauper's chargeability, accompanied by a copy of the order of removal and a statement of the grounds of removal by the post (see stat. 4 & 5 W. 4, c. 76, s. 79). These documents were posted at Dudley, on Saturday the 25th August, 1860. According to the usual and regular course of the post, between Dudley and Leominster, letters posted at Dudley on the Saturday arrive at Leominster and are delivered to the persons to whom they are addressed on the Sunday. The documents above mentioned were, in accordance with the usual course of the post, delivered by a letter carrier employed by the post office to the parish officer of Leominster to whom they were addressed on Sunday the 26th August. On the 12th September the parish officers applied for and on the 15th September obtained a copy of the depositions upon which the order of removal was made, and notice of appeal for the Michaelmas sessions and grounds of appeal were in due time given and served on the respondent parish.

The grounds of appeal admitted the birth settlement of the pauper's husband, Edward Scarlett, and of his father, to be in the appellant borough, as stated in the grounds of removal; and alleged, amongst other matters, that the service of the order of removal was not in accordance with the provisions of the statutes in such case made and provided; and set up a derivative settlement of Edward Scarlett, the pauper's husband, in the parish of Wellington, in the county of Hereford, in right of his grandfather.

At the hearing, objection was taken by the appellants that the service upon the Sunday of the notice *of chargeability, order of removal and grounds of removal, under the circumstances above stated, was altogether void under stat. 29 Car. 2, c. 7. On behalf of the respondents it was contended that the delivery of the documents by the servant of the post office on Sunday was not a service within the meaning of the 29 Car. 2, c. 7, s. 6; the sending by the post on Saturday being in accordance with stat. 4 & 5 W. 4, c. 76, and it appearing that the documents would have been in sufficient time if delivered on the following Monday. And, moreover, that if the Court of Quarter Sessions should hold the objection valid, then they should be entitled to ask that the appeal be dismissed.

The chairman stated that the justices then constituting the Court were equally divided in opinion upon the objection, and that, consequently, the hearing of the appeal upon the merits must proceed. The appellants offered no evidence, and the witnesses for the appellants were called upon their subpoena, but they were not in attendance and did not appear, and thereupon the Court confirmed the order of removal with costs, and afterwards granted the present case.

The question for the opinion of the Court was, whether the service of the notice of chargeability, order of removal and grounds of removal under the above circumstances was void.

If the Court should be of opinion that such service was void, then the order of Quarter Sessions was to be set aside, and an order made

dismissing the appeal or quashing the order of removal not upon the merits or such other order as this Court should direct. But if the Court should be of a contrary opinion, then the order of Quarter Sessions was to be confirmed.

*394] The case was argued, in Michaelmas Term, 1861, *Nov. 13th, before Cockburn, C. J., Wightman and Blackburn, JJ.

J. E. Davis appeared for the respondents; but the Court called upon

H. Matthews and A. Slaveley Hill, for the appellants.—First. These documents are within sect. 6 of stat. 29 Car. 2, c. 7, which enacts that “no person upon the Lord's day shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree, (except, &c.), but that the service of every such writ, process, warrant, order, judgment, or decree shall be void to all intents and purposes whatsoever.” In *Re The Inhabitants of Asprell v. The Justices of Lancashire* (a) a notice of appeal was held to be process within section 6. [COCKBURN, C. J.—I doubt whether a document is process unless it issues from a Court. WIGHTMAN, J.—One of the documents in this case is a copy of the order, which is within the terms of sect. 6.] Then, as the documents reached the appellants on Sunday, the delivery was void. Stat. 4 & 5 W. 4, c. 78, s. 79, requires that these documents shall be sent, “by post or otherwise,” to the overseers of the parish to whom the order of removal is directed; the permission to send them by post is in ease of the parish officers by whom they are to be sent. WIGHTMAN, J.—Suppose the documents had remained in the post office until Monday.] In *The Queen v. The Inhabitants of Slawstone*, 18 Q. B. 388 (E. C. L. R. vol. 83), it was held that a notice of appeal, sent by post in pursuance of stat. 14 & 15 Vict. c. 105, s. 10, was to be considered as “given” (which is the word used in stat. 11 & 12 Vict. c. 31, s. 9) on the *day on which, *395] according to the ordinary course of post, it would have reached the person to whom it was sent, though in fact it was delivered on a later day. [BLACKBURN, J.—*The Queen v. The Inhabitants of Slawstone*, 18 Q. B. 388 (E. C. L. R. vol. 83), does not decide that delivery of the notice on the later day would not be good if it was in time. COCKBURN, C. J.—In that case there was no question about delivery on Sunday. These documents would be sure to reach the appellants on Monday at latest, which would be in time.] In *Colvill, appt., Lewis, resp.*, 2 C. B. 60 (E. C. L. R. vol. 52), it was held that a notice of objection to the person on the list of voters for a parliamentary borough which was sent to him by post in pursuance of stat. 6 & 7 Vict. c. 18, s. 101, and which, in the ordinary course of post, was delivered on Sunday, was well served; but that was because such a notice is not a warrant, process, or order within stat. 29 Car. 2, c. 7, s. 6. As soon as the documents are delivered by the postman at the house of the overseer they are served. In *Re The Inhabitants of Asprell v. The Justices of Lancashire*, 16 Jur. 1067, note, service of notice of appeal on Sunday was held bad, though it was argued that such service, being the act of the servants of the post office, was no default of the overseers sending the notice. In that case service on the following Monday would have been too late: but it has been decided that service

(a) *The Queen v. The Inhabitants of Slawstone*, 16 Jur. 1067, note.

of a writ and of a notice of plea on Sunday is absolutely void as a matter of public policy; *Taylor v. Phillips*, 3 East 155; *Roberts v. Monkhouse*, 8 East 547. [They also cited *Hughes v. Budd*, 8 Dowl. P. C. 315, and *Re Egginton*, 2 E. & B. 717 (E. C. L. R. vol. 75).] *[*WIGHTMAN*, J.—In *Doe v. Roe*, 5 B. & C. 764 (E. C. L. R. [*396 vol. 11]), where a declaration in ejectment was left at the house of the tenant in possession on Saturday, but he did not receive it until the Sunday, it was held that that was not good service.] In *McLeham v. Smith*, 8 T. R. 86, the service of a rule for an attachment on Sunday was held bad; though service of it on a later day would have been in time. [*COCKBURN*, C. J.—That service could only have been effected by an individual specially employed for the purpose. The question in this case is whether sect. 6 of stat. 29 Car. 2, c. 7, attaches on the new mode of sending these documents provided by stat. 4 & 5 W. 4, c. 76, s. 79. *BLACKBURN*, J.—Personal service of these documents is not required.] It must be shown that they reached the overseers, otherwise the Sessions would not have jurisdiction to hear the appeal: *The Queen v. The Recorder of Shrewsbury*, 1 E. & B. 711 (E. C. L. R. vol. 72). [*COCKBURN*, C. J.—Stat. 29 Car. 2, c. 7, s. 6, was intended to prevent a man from being employed in his worldly calling on the Sabbath, but can that enactment apply to a delivery of letters and other documents which is contemplated by the legislature as an ordinary practice? In *Re The Inhabitants of Asprell v. The Justices of Lancashire*, 16 Jur. 1067, note, it was necessary that the overseer should take cognisance of the notice of appeal delivered on Sunday, which also the legislature intended should not be; but if the letter is delivered on Sunday, and the overseer does not open it until the next day, it would be a good service on Monday. *WIGHTMAN*, J.—Suppose stat. 4 & 5 W. 4, c. 76, s. 79, had not passed, and a special messenger had delivered the documents in a letter. *COCKBURN*, C. J.—A special messenger disturbs the privacy of the house.] In *The Queen v. The Justices of Middlesex*, 17 L. J. M. C. 111, 12 Jur. 434, [*397 Erle, J., held that service of notice of appeal against a bastardy order upon the mother on Sunday would not be good, and therefore that day was to be excluded from the calculation of the twenty-four hours within which notice was required to be given by stat. 7 & 8 Vict. c. 101, s. 4. [*BLACKBURN*, J.—In mercantile matters the person receiving a letter is bound by the course of the post: *Adams v. Lindsell*, 1 B. & A. 681; *Dunlop v. Higgins*, 1 H. L. Ca. 381. The fact of putting the documents into the post office may be sufficient, without more, for the purpose of computing the time, but it is another step to say that the delivery of the post is a service within stat. 29 Car. 2, c. 7, s. 6.]

Secondly, the Court of Quarter Sessions were equally divided, and there was no decision on the merits. The case ought to have been adjourned, as was done in *The King v. The Justices of Monmouthshire*, 8 B. & C. 137 (E. C. L. R. vol. 15). According to *The Queen v. The Recorder of Shrewsbury*, 1 E. & B. 711, if the objection was good the appeal should have been dismissed. [*COCKBURN*, C. J.—The Court of Quarter Sessions agreed that the hearing of the appeal upon the merits should proceed, and reserved the question of law for the opinion of this Court. *BLACKBURN*, J.—What was done at the

Sessions was no more than what is done in this Court when the Court is equally divided and the junior Judge withdraws.

J. E. Davis, for the respondent.—Assuming that an order of removal is process within stat. 29 Car. 2, c. 7, *s. 6, the delivery of it by post is neither within the letter of the enactment, nor within the mischief intended to be guarded against. In Rawlins, appt., The Overseers of West Derby, respns., 2 C. B. 72, 82 (E. C. L. R. vol. 52), Erle, J., observed, "The overseer who receives the notice is not called upon to perform any duty that can interfere with the most scrupulous observance of the Lord's day." [COCKBURN, C. J.—That observation applies to any process.] *WIGHTMAN*, J.—The observation was made with reference to the quality of the document sent—to show that it was not process within stat. 29 Car. 2, c. 7, s. 6.] Section 79 of stat. 4 & 5 W. 4, c. 76, and sect. 9 of stat. 11 & 12 Vict. c. 31 mention the sending of the documents as the sending of a notice of dishonour of a bill of exchange would be spoken of. Assuming that a notice sent by post is to be considered as given on the day on which, according to the ordinary course of post, it would reach the person to whom it is sent,—as laid down by Lord Campbell in *The Queen v. The Inhabitants of Slawstone*, 18 Q. B. 388, 392 (E. C. L. R. vol. 83), and adhered to by the Court in *The Queen v. The Recorder of Richmond*, E. B. & E. 253 (E. C. L. R. vol. 96)—a statutory direction that a document shall be sent by post does not make the delivery of it by post amount to service. There is a distinction between acting under the direction of an enactment which authorizes the sending by post and delivering by a private messenger. In *Re The Inhabitants of Asprell v. The Justices of Lancashire*, 16 Jur. 1067, note, Lord Campbell said, "You cannot make out that the notice of appeal was delivered fourteen days at least before the first day of the sessions, without assuming the delivery of the notice on Sunday to be valid."

*399] In that case a service on the *following Monday would have been too late. Here the delivery on Sunday would be good for the Monday following. [He cited *The Queen v. The Justices of Kent*, 18 Justice of the Peace 327, on stat. 16 & 17 Vict. c. 97, s. 107.] Suppose a writ of summons taken out, and a request made by the party that he might not be served personally but by post, and it was delivered on Sunday, and the defendant afterwards appeared and attempted to set it aside, could he be heard to say that the service was absolutely void? [*WIGHTMAN*, J.—According to *Taylor v. Phillips*, 3 East 155, he might.]

Cur. adv. vult.

WIGHTMAN, J. (Feb. 22d), delivered the judgment of the Court.

The question for our decision in this case is whether transmission of a notice of chargeability and copy of an order of removal and statement of the grounds of removal by post, under sect. 79 of stat. 4 & 5 W. 4, c. 76, where, by the ordinary course of post, the documents reach the hands of the officers of the parish to which the removal is about to be made on a Sunday, is void by the operation of the 29 Car. 2, c. 7, s. 6. We are of opinion that it is not.

Admitting that the delivery of such documents in the ordinary manner would be service of an order or process within the meaning of the latter statute, we are of opinion that transmission by post is not such service. If transmission by post had been service or equivalent

to service, the provisions of sect. 79 of stat. 4 & 5 W. 4, c. 76 and sect. 10 of stat. 14 & 15 Vict. c. 105 would have been wholly unnecessary. The effect of these *enactments is to substitute for service something which certainly was not "service," within the meaning of this term, as used in the 29 Car. 2, c. 7, s. 6. It appears to us that it would be to put a forced construction on the latter statute to bring within its operation something which at the time of its enactment would not have been within its terms, and which, properly speaking, is not, even by implication, brought within them now. The statutes to which we have referred do not say that the sending by the post shall be service: they permit transmission by the post in lieu of service.

Nor is it clear that the evil or inconvenience contemplated by the 29 Car. 2, c. 7, s. 6, exists in such a case. There is no desecration of the Sabbath by the employment of an agent for the special purpose of serving process; no disturbance of the privacy of the party to be served; or (necessarily) any distraction of his mind from matters of higher consideration. If the letter be delivered at all on Sunday (which must depend on the postal regulations of the district or parish), it will be delivered by the letter carrier in the course of his ordinary rounds. It is optional with the overseer whether he will open the letter or reserve its perusal to the following day. And as the legislature, in passing the modern enactments for the transmission of these notices by post, was of course perfectly familiar with the existing practice of the post office in respect of the delivery of letters on Sunday, we cannot but think that, if it had been intended to make such notices void if they happened to reach the officers of the opponent parish on a Sunday, some provision to that effect would have been added.

We are also forcibly struck by the inconvenience which might arise from holding the objection to be fatal. *Notices of this sort have often to be sent between distant parishes, where the course of the posts upon which the precise hour of delivery may depend may be wholly unknown to the parish officer transmitting the document. The existence or the non-existence of a cross-post may make a letter, which was calculated to reach its destination on a Saturday or Monday, arrive a day later or sooner. An alteration in the arrangements of the post office, or even an accidental and unforeseen delay, may have the same effect. And as these objections are generally taken, not to uphold the sanctity of the Sabbath, but to defeat justice, such might be the effect even where there may have been a total absence of all intention to violate the Act of Charles the Second.

It appears to us therefore that the right course is to treat the case as not falling within the provisions of the latter statute; while, at the same time, conformably to the decision in *Re The Inhabitants of Asprell v. The Justices of Lancashire*, 16 Jur. 1067, note, we should treat the notice, when received on the Sunday, as operating only (so far as time is concerned) from the ensuing day. Order confirmed.

*402] *BRINE v. THE GREAT WESTERN RAILWAY COMPANY. Feb. 22.

Pleading.—Replication.—Departure.—Demurrer.

Declaration stated that the defendants wrongfully raised an embankment near the plaintiff's house, and wrongfully continued the same, by reason whereof large quantities of water flowed against and into the house: with an averment of special damage. Plea, that the embankment was raised and continued by the defendants under certain Acts of Parliament. Replication: that, although the embankment was raised and continued under the Acts of Parliament, the flowing of the water against and into the plaintiff's house was occasioned by the wrongful construction and negligent and improper raising of the embankment, and the want of proper and sufficient drains to the same, and the continuing the embankment so wrongfully constructed and insufficiently drained. On demurrer, held:

1. That a departure in pleading was ground of general demurrer.
2. That the replication was not a departure from the declaration; by Crompton and Blackburn JJ., Cockburn C., J., not assenting.

THE declaration stated that the plaintiff was lawfully possessed of a messuage and premises situate at Adber, in the parish of Trent, in the county of Somerset, in which messuage and premises the plaintiff and his family resided and dwelt. Nevertheless the defendants "wrongfully raised and made and formed, and caused and procured to be raised, made, and formed, a certain embankment of earth near the plaintiff's said house as aforesaid, and wrongfully continued the same from thence hitherto; by reason whereof, from thence continually to the commencement of this suit, divers large quantities of water have run and flowed down to, upon, against, and into the said messuage and premises of the plaintiff, whereby the walls, roofs, ceilings, paperings, floors, stairs, doors, and other parts thereof and therein being have been greatly weakened, injured, wetted, and damaged; and by reason of the premises the said messuage and premises of the plaintiff became, and were, and have *been, and are damp, incommodious and less fit for habitation; and also by reason of the premises the plaintiff and his family have been, during all the time aforesaid, rendered sick and ill, and the plaintiff has been obliged to call in and employ divers medical men in and about curing the sickness and illness so occasioned as aforesaid, and to expend and lay out large sums of money in paying the same, and in and about removing and causing to be removed the said water so flowing upon and into his said messuage as aforesaid."

Second plea.—That the said embankment was raised, made, and formed, and continued by the defendants, under and by virtue of the powers of certain Acts of Parliament granted in that behalf, to wit, "The Wilts, Somerset and Weymouth Railway Act, 1845," "The Great Western Railway Act, 1851," and "The Great Western Railway (Berks, Hants and Wilts, Somerset and Weymouth) Act, 1854."

Replication to the second plea.—That although true it is that the said embankment was raised, made and formed, and continued by the defendants, under and by virtue of certain Acts of Parliament referred to in the said second plea, yet the plaintiff says that this is no bar to his claim in this action, because he says that the running and flowing of the water upon, against and into the plaintiff's messuage, as in the declaration mentioned, was and is occasioned by the wrongful construction and negligent and improper raising, making and forming of

the said embankment, and the want of proper and sufficient drains to the same, and the continuing the said embankment so wrongfully constructed and insufficiently drained from thence hitherto, whereby and by reason whereof, after the raising, making and forming the said embankment, and after the making and completing the railway of which the said embankment formed a part, the said [*404] running and flowing of the water upon, against and into the plaintiff's said messuage took place, and not otherwise.

Demurrer and joinder therein.

The demurrer was argued in this Term, January 24th, by

Montague Smith (with him *Gadsden*), for the defendants.—The replication is a departure from the declaration: not a new assignment. The declaration complains of damage to the plaintiff's dwelling-house by the wrongful erection and continuance of an embankment: the replication, admitting that the erection and continuance of the embankment were authorized by the statutes referred to in the plea, introduces a new cause of action, viz., negligence in the mode of erecting the embankment and in not providing proper and sufficient drains. The plea is an answer to the declaration, but would not be a good rejoinder to the replication; and that is a test whether the replication is a departure from the declaration. [He referred to 1 Chitt. on Plead. 674, 7th ed., by Greening, and the cases cited in note (1) to Richards *v.* Hodges, 2 Wms. Saund. 84 a, 6th ed.] [COCKBURN, C. J.—Suppose the statutes had not been pleaded, and the case had gone down to trial on the plea of not guilty, it would not have been necessary for the plaintiff to prove negligence. This is like the case of an action against a person for doing something on his own land; a replication admitting that the defendant had a right to do the act, but that it was done negligently, would be a *departure.] The replication puts forward as a distinct cause of action, not an excess of authority, but [*405] negligence in erecting the embankment; and therefore it does not support and fortify the declaration, but states a new cause of action. A departure in pleading is ground of general demurrer. [CROMPTON, J.—Some doubt has been thrown upon that, but we so held in Bartlett *v.* Wells, 1 B. & S. 836 (E. C. L. R. vol. 101). COCKBURN, C. J.—I think departure is not matter of form, but of substance.]

J. B. Karslake (with him *Prideaux*), for the plaintiff.—First, departure is not ground of general demurrer. [CROMPTON, J.—It would be inconvenient if it was not, because the only mode of taking advantage of a departure is by demurrer, and special demurrs are abolished.] The defendants might have gone before a Judge at chambers and had the replication reformed. [COCKBURN, C. J.—That would not be a convenient or satisfactory mode of disposing of the matter. One of the grounds of our decision in Bartlett *v.* Wells, 1 B. & S. 836 (E. C. L. R. vol. 101), was that the replication was a departure.]

Secondly, the replication is not a departure. It is consistent with the declaration and states the same cause of action. The declaration states that the defendants "wrongfully" erected the embankment; and that word may be taken to include negligence. The plea founded on the statutes is *prima facie* an answer to the declaration; and the repli-

cation answers the plea by showing that, though the erection of the embankment was rightful under the statutes, it was wrongful by reason of negligence. [CROMPTON, J.—The word "wrongful" in this declaration may be construed to mean without any ^{*406]} authority under law or statute. The defendants set up certain things as a lawful excuse; then the plaintiff may show that the excuse is not sufficient. COCKBURN, C. J.—The plaintiff, who knows what his cause of action is, should state it as early as possible. Why, by his omission to allege negligence in his declaration, should the defendants be put to plead their Acts of Parliament?] The plaintiff, in framing his declaration, does not know what defence will be set up, and he is not bound to look through the defendants' Acts of Parliament to see whether they have a justification under them. [CROMPTON, J.—The declaration in Turner v. The Sheffield and Rotherham Railway Company, 10 M. & W. 425, did not allege that the houses injured by the works of the railway Company were so injured without the consent of the owners, and were not specified in the schedule annexed to the Company's Act; those allegations were introduced in the replication to a plea justifying under the Company's Act. The advantage of this mode of pleading is, that the authority under which the defendants did the act complained of is shown.] The cause of action is contained in the per quod, as in Lawrence v. The Great Northern Railway Company, 16 Q. B. 643 (E. C. L. R. vol. 71); so that the means by which the damage was caused need not be stated. The forms of pleadings given in schedule B. to The Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, exclude all common words of mere form, such as "vi et armis," "wrongfully," &c. In an action for diverting the flow of a stream from the defendant's mill, No. 30, the declaration simply states "That the defendant, by cutting the bank of the said stream, diverted the water thereof from the said mill." This declaration would have been good without the word "wrongfully."

^{*407]} *Montague Smith*, in reply.—Although the forms given in The Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, have left the declaration at large, still, where negligence is the gist of the action, the declaration should allege it. [CROMPTON, J.—The plaintiff should state in his declaration, as shortly as he can, the legal result of the facts which constitute his cause of action.] The plaintiff must recover on the statement of the cause of action in his declaration. Only one tenth of the damage may have arisen from the negligence, and the plaintiff may have already received compensation for that occasioned by erecting the embankment. If the declaration had charged negligence, the defendants would have pleaded, as to erecting the embankment, the authority under their statutes, and as to the negligence, not guilty; or they would only have pleaded a plea to the negligence. This declaration would have been supported without proof of negligence; whereas the replication puts forward negligence as the real cause of action, and is therefore a departure: Palmer v. Stone, 2 Wils. 96, cited in note (1) to Richards v. Hodges, 2 Wms. Saund. 84 c, 6th ed. [J. B. Karslake.—Palmer v. Stone is commented upon by Manning, Serjt., in note (a) to Evans v. Elliott, 6 N. & M. 606, 608.] [CROMPTON, J.—The replication in that case set up

entirely new matter.] It must be assumed that the Acts of Parliament under which the defendants justify were known to the plaintiff.

Cur. adv. vult.

Feb. 22. CROMPTON, J. (sitting alone) read the following judgments.

*MELLOR, J.—The declaration in this case alleged that the defendants, whilst the plaintiff was possessed of and residing in a certain dwelling-house, wrongfully raised and continued a certain embankment of earth near the plaintiff's said house, by reason whereof large quantities of water have run and flowed down to and upon and against the said dwelling-house of the plaintiff, rendering it damp and incommodious, and less fit for habitation, &c. To this declaration the defendants, for a second plea, pleaded that they raised and continued the said embankment under the powers and provisions of three Acts of Parliament granted in that behalf. To this plea the plaintiff replied that, although true it was that the said embankment was raised, made, and continued by virtue of the powers and provisions of the said Acts of Parliament, yet he said that the plea was no bar to his claim because he said that the running and flowing of the water to and against his said dwelling-house, in the declaration mentioned, was occasioned by the wrongful construction, and negligent and improper raising and making of the said embankment, and the want of proper and sufficient drains to the same. To this replication the defendant demurred, alleging it to be a departure from the declaration.

Upon the argument it was contended, by the plaintiff, that a departure in pleading was not ground of general demurrer: but we thought this point not open for the plaintiff in this Court after our recent decision in the case of *Bartlett v. Wells*, 1 B. & S. 836; see also note (1) to *Richards v. Hodges*, 2 Wms. Saund. 84 f, 6th ed.

The real question on the argument was, whether the replication was a departure from the declaration. On considering what is the gravamen of the charge alleged in *the declaration, I am of [*409 opinion that the replication is no departure. The substance of the complaint in the declaration is the wrongfully raising, making, and continuing an embankment near the plaintiff's dwelling-house, and *by means thereof wrongfully causing water to run and flow to and against such dwelling-house*, whereby it was rendered damp and incommodious, &c. The plea excuses the making and raising of the embankment under the provisions of three Acts of Parliament, to which the plaintiff in substance replies, that his complaint against the defendants is, not for the lawful exercise of the powers conferred upon them, but for the causing the water to run and flow against his dwelling-house by the wrongful construction of the embankment, and by the negligent and improper raising and making it without proper drains. It appears to me that the substance of the complaint, both in the declaration and replication, is the wrongful causing of the water to run and flow against the dwelling-house of the plaintiff, and although it may be doubtful whether the replication is to be considered as an informal traverse of the plea, or in the nature of a new assignment, it appears to me not to be obnoxious to the very wholesome rule against departure in pleading.

In Co. Litt. 304 a, as cited in note (1) to *Richards v. Hodges*. 2 Wms. Saund. 84 a, b, 6th ed., "a departure in pleading is said to be, when a man quits, or departs from the ground which he has first relied upon, and has recourse to another"; and the rule is stated by Tindal, C. J., in *Prince v. Brunatte*, 1 Bing. N. C. 435, 438 (E. C. L. R. vol. 27), 1 Scott 342, 345, in the following terms: "Undoubtedly, where a replication does not consist with or fortify the declaration, it [is] a departure in pleading; *for a plaintiff is not entitled to declare in respect of one right, and then to set up another in his replication. The only question here, is, whether this replication does not set up a title inconsistent with that disclosed in the declaration." Another test of a departure in pleading is stated by Tindal, C. J., in *Smith v. Nicolls*, 5 Bing. N. C. 208, 218 (E. C. L. R. vol. 15), 7 Scott 147, 164, as follows: "That which is a departure in pleading is a variance in evidence; and if the evidence in support of the replication would sustain the allegation in the declaration, there is no departure." Applying that test to the present case, it appears to me that the evidence necessary to prove the matter alleged in the replication is not inconsistent with, but would clearly support, the allegations in the declaration.

Tried therefore by the test of variance in evidence, as suggested in *Smith v. Nicolls*, I think that the objection fails, and that the plaintiff is entitled to recover on this demurrer. The case of *Palmer v. Stone*, 2 Wils. 96, cited by Mr. Smith, is clearly distinguishable, inasmuch as the plea was, that the defendant impounded the mare damage feasant, which is a private trespass, whereas the rejoinder, that the mare was mangy, set up that which is a common nuisance.

I am therefore of opinion that the plaintiff is entitled to judgment.

CROMPTON, J.—I concur with my brother Mellor in thinking that the replication in this case is no departure from the declaration. The declaration is for wrongfully, that is, without lawful excuse, causing the water to flow *on the plaintiff's land and against his house by means of an embankment, and so injuring his premises, and the plea is a justification for so causing the water to flow and injure the premises under the authority conferred on the defendants by three Acts of Parliament. The replication is very inartificially drawn, but it appears to me in substance to avoid the plea, either by way of informal denial that the acts complained of were justified by the authority of the statutes, or by way of showing how they were not justified.

The replication commences by a statement that it is true that the embankment was raised under the powers of the Acts, and then goes on to show that it was negligently and improperly constructed, so as to show that it was not justified by the powers of the Acts. This seems repugnant and inartificial, but, taken according to its real meaning, seems to me to amount to saying,—though you had the authority of the Acts of Parliament, and were raising your embankment under their authority, yet you did not so construct your embankment as to make it a work done under the authority of the statutes.

The distinction is now clearly established between damage from works authorized by statute, where the party generally is to have compensation, and the authority is a bar to an action, and damage by

reason of the works being negligently done, as to which the owner's remedy by way of action remains: and it seems to me that the effect of the plea and replication, fairly considered as on general demurrer, is, that the plea says, what you complain of arises from works justified under statutes, and for which your remedy, if any, is for compensation; and that the replication in artificially answers *this [*412 by saying the works causing the injury were not authorized by the Acts of Parliament, but were negligent and improper works, for which you are answerable in damages.

Whether the replication is a mere informal denial, or whether it explains why the plea is not a bar, or is in the nature of a replication of excess, it is not necessary to inquire.

The plea, pleaded in a compendious and general form, that the works were done under the authority of the statutes must, I think, be construed as if it contained all the necessary averments of a special plea expanded on the record, and would, I think, be bad if not construed to contain expressly or impliedly an averment that the works were such as were authorized by the Act. And to this averment the replication seems to me to contain a direct answer. It might depend on the mode in which the special plea, if expanded on the record, were framed, whether the formal mode of answering the plea would be by a denial of the averment of the acts complained of being justified by the statutory authority, or whether a new assignment or replication of excess might be rendered necessary by reason of the plea containing an averment of *quæ est eadem*, or of the acts being done under the statutory authority *without any unnecessary damage*. But these questions no longer arise in the general mode of pleading adopted in this case, which seems sufficient, as special demurrers are no longer allowed. It is sufficient if the replication contains, as I think it does, either a denial that the Acts complained of were authorized by the statutes, or an explanation how they were not so authorized.

Suppose that this case had arisen before the new rules *of pleading, when the whole matter of defence would have arisen [*413 under the general issue of Not guilty. The plaintiff would have proved the injury to his premises by the water being thrown upon them by means of the embankment. The defendants would have shown their authority under the Acts of Parliament, and the plaintiff's answer would have been that the construction of the works was such as was not authorized by the statutes. The evidence which would prove the replication would therefore support the declaration, according to the test proposed by Lord Chief Justice Tindal, cited by my brother Mellor; and it should be observed that the facts in the replication do not the less prove the declaration because the replication contains something more in answer to the plea than would be necessary to prove the declaration, so long as the new matter is not inconsistent with that in the declaration. The case in principle does not differ from the ordinary case of a plaintiff replying, to a plea setting up a license or authority in law, or in fact, or under a deed, that the acts were not such as were covered by the license, or were acts done in excess of it.(a) The plaintiff was not called upon to anticipate

(a) See *Bracegirdle v. Peacock*, 8 Q. B. 174, 185, 186 (E. C. L. R. vol. 92).

the defence by showing that the works were not justified by reason of an Act of Parliament which might never be set up. Such mode of pleading would probably be improper, and the matter alleged would probably have no effect on the subsequent pleadings, and be treated as merely idle; as in the case when a plaintiff alleges in his declaration that a defendant, from whom he expects a plea of infancy, was of full age when he executed the instrument declared on. Such *414] pleading is what has been called "leaping before you come to the hedge."

I think that the plea in the present case must be taken to aver that the grievances complained of were such as were justified under the authority of the statutes, and that the replication is not in the nature of bringing forward a new cause of action, but avoids a plea either by an informal denial of the implied averments of the plea, or by stating matters which show how the plea does not answer the declaration, because the grievances in the declaration were not such as the statute authorized.

If indeed it could be made out, as argued by Mr. Smith, that the replication disclosed a new distinct cause of action, it would no doubt be a departure; but after consideration, and with great respect for the doubts thrown out in the course of the argument on this part of the case, I construe the replication as not complaining of the breach of some specific statutory duty, as for the building of a bridge or making a communication, but as averring and undertaking to prove that the construction of the works was so faulty as not to be under the protection of the statutes; in other words, as alleging that the grievances complained of in the declaration were not occasioned by the building of an embankment which the statutes authorized, because the statutes must be taken to authorize properly constructed embankments only. The replication seems to me to set up the improper construction of the embankment in question as an answer to the supposed protection under the statutes, and so to rely on the plaintiff's common law right, *415] claimed in his declaration, to have damages for the *mischief occurring from the water being thrown on his land without any lawful excuse.

I therefore concur with my brother Mellor in thinking that our judgment should be for the plaintiff; but the decision must be taken as the decision of him and myself only, as the Lord Chief Justice is not prepared to assent to the judgments we have delivered.

Judgment for the plaintiff.

MEMORANDUM.

In this Vacation, William Matthewson Hindmarch, Esq., of Gray's Inn; George Boden, Esq., of the Inner Temple, and Thomas Weatherley Phipson, Esq., of Lincoln's Inn, were appointed of Her Majesty's counsel, learned in the law.

CASES

ARGUED AND DETERMINED

III

THE QUEEN'S BENCH,

IV

Easter Term,

XXV. VICTORIA. 1862.

The Judges who usually sat in banco in this Term, were,—

COCKBURN, C. J.,

BLACKBURN, J.,

CROMPTON, J.,

MELLOR, J.

Ex parte WALLIS. April 17.

Articed clerk.—Assignment of articles.—Interval of time.

W. was articled for five years to his father, who was an attorney. After part of the time of service had elapsed the father died, and the articles were shortly afterwards assigned to C., who was also an attorney. In the interval between the death of the father and the assignment of the articles W. attended regularly at the office, and was employed in the business there. The Court refused to allow that interval to be reckoned as part of the five years.

A PERSON of the name of Wallis was, on the 24th November, 1857, articled for five years to his father, who was an attorney, and served from thence until the 28d January, 1858, when the father died. On the 20th February the business was transferred to C., who was also an attorney, and the articles of clerkship were assigned to *him [⁴¹⁷ by the widow. In the interval the clerk attended regularly at the office, and was employed in the business there in the same manner as he had been previous to the death of his father.

Philbrick moved that the time which had elapsed between the death of the father and the assignment of the articles of clerkship might be reckoned as part of the five years during which the clerk was bound to serve.—The 6 & 7 Vict. c. 73, s. 12, enacts, “Every person who now is or hereafter shall be bound by contract in writing to serve as clerk to any attorney or solicitor shall, during the whole time and term of service to be specified in such contract, continue and be actually employed by such attorney or solicitor in the proper business,

on Saturday night the 5th October, 1861; and deposited his portmanteau, containing a case of patterns, at the luggage and cloak office on the up platform of the Paddington Station, and on payment of 2d. received a printed ticket of which the following is a copy.

"Great Western Railway,

"Paddington Station.

"No. 147.

"Luggage and Cloak Office.

"

day, the 5th of October, 1861.

	Articles.	Amount. s. d.
"1 Portmanteau		2
Trunk		
Box		
Chest		
Carpet-Bag		
Basket		
Bundle		
Case		
Parcel		
Coat		
Rug		
Insurance on £ @ 1d. per £		
Additional charge for days @ 1d.		
Each article per day		
		Total,

"Left in the name of Stallard, and subject to the conditions on the other side. "PROSSER, Clerk.

"This Ticket to be given up when the luggage is taken away.

*"Conditions.

*422] "N. B.—THE GREAT WESTERN RAILWAY COMPANY appoint that the undermentioned sums be paid them for warehousing passengers' luggage, which has been, or which is about to be, conveyed on their railway, viz.:

"For any period not exceeding three days, 2d. for each package; and after three days, one penny additional for each package per day or part of a day."

[Then followed a condition limiting their liability for loss of or injury to any packages beyond the value of 5*l.*, unless the value and nature were declared, and one penny per pound of the declared value paid for each day or part of a day for which the same should be left.]

"Every person depositing luggage will be furnished with a receipt, stating the number and description of the articles deposited, which receipt must be given up to the Company's servants upon their delivery of the articles thereon described; and the Company give notice, that they will not deliver up luggage except to persons producing the proper receipt for the respective articles claimed, which delivery shall acquit the Company from all further claims in respect thereof."

"The Company will not be responsible, under any circumstances, for loss of or injury to articles except left in the cloak room."

"The Company's servants are prohibited, under pain of instant dismissal, from receiving fees or gratuities under any pretence whatever."

On Sunday evening, the 6th October, the plaintiff, wishing to leave London by the mail train of the Great Northern Railway for Sheffield, went to the Paddington Station at 20 minutes past 8 o'clock for his

portmanteau ; he found the luggage and cloak office *locked, and no person in attendance. After waiting some time, he was [*423 told by a porter that the superintendent was on the other side ; whereupon he went across to the down platform, from which the 8 p. m. train was starting, and the superintendent sent a porter with the key of the luggage and cloak office, and he obtained his portmanteau. He was thus delayed forty minutes, and by reason of that delay was too late for the train to Sheffield that night. There are two luggage and cloak offices at the Paddington Station, one on the up platform and the other on the down platform, which are open all day on week days, but on Sundays they are open only for about twenty minutes after the arrival and before the departure of trains respectively. The plaintiff was not aware of this arrangement ; and when he left his portmanteau on Saturday evening he gave no notice at what time he should want it.

The learned Judge directed the jury that though the conditions on the ticket did not mention any time at which articles left might be obtained, there was an implied contract that the defendants would have some person attending at the office at reasonable times ; and he left it to them to say whether the portmanteau was, under the circumstances, delivered up to the plaintiff within a reasonable time ; reserving leave to the defendants to move to enter a nonsuit if the Court should be of opinion that there was no evidence to be left to the jury on which they could reasonably find for the plaintiff. The jury negatived special damage, and gave a verdict for the plaintiff for 40s.

J. B. Karslake moved accordingly.—There was no evidence on which the jury ought to have found that there was unreasonable delay on the part of the *defendants in delivering up the plaintiff's [*424 portmanteau. The defendants are not bound to keep open the luggage and cloak office day and night, nor all day on Sunday. The accommodation afforded by that office is for passengers travelling by the defendants' railway ; and all that is required is that the office should be open for a reasonable time before the departure of each train.

COCKBURN, C. J.—I am of opinion that there ought to be no rule. By the conditions printed on the ticket the Company have not made it part of the terms of the bailment of the portmanteau, that it should not be delivered up at any particular time on Sunday ; on the contrary, articles left at the office are to be delivered up on the production of the ticket. Although there may necessarily be more delay in getting luggage from the office on Sunday than on other days, still the defendants were bound by the conditions to deliver up the portmanteau within a reasonable time, and whether they did so deliver it up was a question for the jury. I should not have been dissatisfied if the verdict had been for the defendants ; and perhaps, if they were not precluded by the smallness of the damages from having a new trial on the ground that the verdict was against the evidence, I should have been disposed to grant that rule. The question, however, whether the person who deposits his luggage gets it back within a reasonable time, is entirely and exclusively for the jury.

CROMPTON, J.—I am of the same opinion. There was evidence to go to the jury of unreasonable delay. The plaintiff sues the defend-

COCKBURN, C. J.—I am of opinion that there ought to be no rule. The effect of the two local Acts is to bring this case within the rule which we have acted upon with regard to poor rates, (a) viz., that the duty of magistrates when payment is sought to be enforced is to see that there is such a rate as is alleged, and that the party summoned is assessed to it, and that he has not paid his assessment: when they have ascertained these matters,—the rate being good on the face of it,—their duty is to enforce payment, and not to enter into the question of its legality, which is for the jurisdiction of *the Quarter Sessions on appeal. By the first Act a right is given to appeal against the rate, and by the subsequent Act it is made enforceable in all respects like a poor rate. The only inquiry by the magistrates is to be, whether the person summoned “is chargeable with or liable to pay the rate:” matters which do not go to the question of its validity. The objection in the present case goes, not to the liability of the applicant to pay, but to the validity of the rate. The magistrates were therefore right in refusing to entertain the objection, which raised matter for the jurisdiction of the Quarter Sessions on appeal.

CROMPTON, J.—I also am of opinion that we ought not to interfere under stat. 20 & 21 Vict. c. 43. The rate in question is good on the face of it; by the first local Act the Quarter Sessions are to have the jurisdiction of determining any objection to its validity or formality. Mr. Foster must go the length of saying that even in the event of the Quarter Sessions on appeal having decided in favour of the rate, two justices could afterwards adjudicate on its validity. If the justices thought that the rate was a nullity, they might have declined to issue their warrant, and the parties seeking to enforce payment of the rate might have applied to this Court for a rule on the justices to issue it. Also, by sect. 5 of stat. 20 & 21 Vict. s. 43, it is discretionary with the Court to order a case to be stated.

BLACKBURN, J.—Stat. 20 & 21 Vict. c. 43, s. 2, gives an appeal from the determination of the justices in cases which they “have power to determine in a *summary way.” The first complaint [of the applicant was that the justices ought to have heard the evidence in support of the objection that the rate was a nullity or invalid, and his second that on their refusal to do so they ought to have stated a case for the opinion of this Court. But the proceeding under the local Act was not a matter which, under stat. 20 & 21 Vict. c. 43, s. 2, they had power to determine in a summary way. Sect. 51 of the first local Act gives an appeal against any rate to the Quarter Sessions; and by sect. 11 of the second local Act, the justices before whom a person is summoned for non-payment of the rate are to enforce payment, if he shall not prove to the justices “that he is not chargeable with or liable to pay such rate:” it could not have been intended by the legislature that the matter which they had previously said should be decided by appeal to the Quarter Sessions, should be inquired into by two justices. The words would be satisfied by showing that he was not the person charged, or that he had paid the

(a) See Reg. v. The Justices of Kingston upon Thames, E. B. & E. 256 (E. C. L. R. vol. 96); and Reg. v. Bradshaw and others, Justices of Warwickshire, 29 L. J. M. C. 176; 6 Jur. N. S. 629.

rate, or that he was not the occupier, as in the case of poor rate. The present case is not within the words or spirit of stat. 20 & 21 Vict. c. 43, s. 2, which refers to matters of which the justices have summary jurisdiction. There is a distinction between a rate which is absolutely void, and a rate which is informal: if the rate is void, the justices might have refused to issue their warrant, and probably this Court would not have compelled them to issue it; but the justices have not jurisdiction to determine whether the rate is good or not.

MELLOR, J., concurred.

Rule refused.

**Ex parte MANNERING and Another, Churchwardens of STAPLEHURST. April 16.* [*431]

Church rate.—Notice to dispute validity.—53 G. 3, c. 127, s. 7.

A person summoned before justices for non-payment of a church rate contended that the summons should be dismissed on the grounds that the rate was wrongly described in the summons and that the rate was illegally made. These grounds of objection having been argued, and the magistrates being about to deliberate, he gave notice that he disputed the validity of the rate and his liability to pay it; and thereupon the justices decided that their jurisdiction was taken away by the third proviso to sect. 7 of stat. 53 G. 3, c. 127. This Court refused a rule on the justices to make an order for payment of the rate.

THIS was an application for a rule under stat. 11 & 12 Vict. c. 44, s. 5, calling upon two justices of Kent to show cause why they should not make an order upon Elisha Balley for payment of the sum of 6s., assessed on him as his proportion of a church rate for the parish of Staplehurst, in the county of Kent.

At a vestry meeting of the parish of Staplehurst duly convened and held on the 1st November, 1861, a resolution for a church rate of 3d. in the pound was carried by a majority of the parishioners then present. In pursuance of that resolution, the churchwardens, on the 10th January, 1862, made a rate upon the persons liable to pay the same, among whom Elisha Balley was assessed and charged with the sum of 6s. as his proportion. Upon application for payment he refused to pay: in consequence of which refusal an information against him was laid by one of the churchwardens, and a summons issued thereupon. On the hearing of the information, after the case for the complainant had been closed, the attorney for Elisha Balley submitted to the magistrates *that the summons should be dismissed for two reasons. First, that by the summons Elisha Balley was summoned for the non-payment of a rate made on the 10th January, 1862, whereas the rate, if made at all, was made on the 1st November, 1861. Secondly, that the rate purporting to have been made on the 1st November, 1861, was illegally made, on the ground that the chairman of the meeting had refused to put an amendment, moved by one of the parishioners at the meeting, to the effect that the amount of the estimate be raised by voluntary contribution. The counsel for the complainant in reply insisted that the rate was legally made, and Elisha Balley properly summoned; and he asked that an order for payment might be made. The magistrates being about to deliberate, the attorney for Elisha Balley then stated to them

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that he disputed, under the third proviso of sect. 7 of stat. 53 G. 3, c. 127, the validity of the rate, and the liability of Elisha Balley to pay the same. No notice of any objection to the validity of the rate, or of the liability of Elisha Balley to pay the same, was given to the magistrates at the hearing by Elisha Balley or his attorney other than or at any other time than the notice above mentioned. The magistrates were of opinion that their jurisdiction was taken away by that enactment, and declined to make an order upon Elisha Balley for payment.

Barrow, in support of the application.—By the third proviso in sect. 7 of stat. 53 G. 3, c. 127, "if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment *thereupon."

*433] But it was not intended that the party summoned should argue the case before the magistrates, and take the chance of a decision in his favour, and then, on finding that their judgment was likely to be against him, withdraw the matter from their jurisdiction by a bare announcement that he disputed the rate or his liability to pay it. If a party intends to avail himself of this proviso, he should give notice that he disputes the validity of the rate or his liability to pay it when the case is called on. The objection taken and argued before the magistrates, that the summons was irregular and informal, was one exclusively for their decision; and therefore the defendant having submitted the case to the jurisdiction of the magistrates could not afterwards withdraw it from them. [He cited *Reg. v. The Justices of Salop*, 29 L. J. M. C. 39.(a)]

Cockburn, C. J.—This case is different from the case cited, where this Court refused to grant a certiorari to remove an order for payment of a church rate, the notice of disputing the validity of the rate having been given after a formal objection to the rate had been argued and the magistrates had decided upon it. Here the party summoned intended bona fide to dispute the validity of the rate, and gave notice thereof prior to the decision of the magistrates upon the points which had been argued, and they acquiesced in the bona fides of the objection, and held their hands. Under these circumstances it would be a strong thing for this Court to command them to make an order enforcing payment of the rate. I think therefore we ought not to interfere.

*434] *Crompton*, J.—I think that in this case the objection was taken in time to enable the magistrates to forbear giving judgment. When a person summoned before magistrates has taken an objection and invited them to decide upon it, and they have done so, this Court will not issue the prerogative writ of certiorari to bring up their order. But here the magistrates, thinking that the objection was bona fide taken, have forborne giving their judgment, and we ought not to compel them.

Blackburn, J.—I think the distinction between this case and the case cited is that mentioned by my brother Crompton. In that case the objection under stat. 53 G. 3, c. 127, s. 7, was not taken until after the magistrates had decided: here the notice was given before any

(a) S. C. nom. *Reg. v. Wicksted and another, Justices of Salop*, 6 Jur. N. S. 143.

determination by the magistrates, and when there was full time for them to forbear giving their judgment.

MELLOR, J.—The argument that the party summoned in this case is not within the proviso to sect. 7 of stat. 53 G. 3, c. 127, because, to some extent, he allowed the magistrates to go into the inquiry, is answered by the consideration that it is convenient that the magistrates should hear what objections are made to the rate. The proviso only requires that notice shall be given before the *decision*; and here the magistrates declined to make an order, because they believed that the objection was made bona fide.

Rule refused.

*HELEN EMMA HESTER TURNER v. WILLIAM [485
BARNES and Others. April 25.

Mortgage deed.—Building Society.—Tenancy at will.—Distress.—8 Ann. c. 14, ss. 6, 7.

By indenture between G. W. T., proprietor of shares in a Building Society, and the defendants, trustees of the Society, reciting, among other things, that G. W. T. had, pursuant to the rules of the Society, agreed to pay into the Society for the term of fourteen years, the quarterly sum of 16*l.* 3*s.* 2*d.* in respect of his shares; and that for securing the quarterly payments he had agreed to execute the security intended to be effected by that indenture, G. W. T. conveyed a house, of which he was seized in fee, to the defendants in fee. The deed contained a proviso for quiet enjoyment by G. W. T. if he paid the quarterly sums, &c., and observed the rules of the Society and the covenants in the deed; but that in case he made default the defendants might enter, and lease or sell the house, and out of the proceeds retain the amount of payments in arrear, &c., and pay the surplus, if any, to G. W. T.; and a clause by which G. W. T. agreed to become tenant of the house to the defendants, their heirs or assigns, or other the trustees or trustees for the time being of the Society, thenceforth during their will, at the clear net yearly rent of 66*l.*, payable on the usual quarterly days, subject to the powers of distress and entry for non-payment thereof, and to all usual remedies as in leases of like property. G. W. T. died, leaving payments in arrear; the defendants distrained upon the goods in the house, which was in the occupation of his widow, who subsequently took out administration.

1. *Quare*, whether the deed created the relation of landlord and tenant between the parties? But assuming that it did, held that, the tenancy under the mortgage being at most only a tenancy at will, the distress was not made during the possession of the tenant from whom the rent became due within the proviso in sect. 7 of stat. 8 Ann. c. 4, and therefore was not justified under sect. 6 of that Act.

2. *Quare* of the decision in *Walker v. Giles*, 6 C. B. 662.

THE first count of the declaration was for the detention of the plaintiff's goods, that is to say, household furniture, and other chattels and effects of the like nature. The second count was for the conversion of the same goods.

Pleas.—1. To the first count, a traverse of the detention. 2. To the second count, not guilty by statute 11 G. 2, c. 19, s. 21. 3. To the whole *declaration, that the goods were not the plaintiff's. 4. To the whole declaration, that G. W. Turner by deed conveyed a messuage and hereditaments then in his occupation and possession to the defendants, their heirs and assigns, by way of mortgage for securing payment of the sum of 550*l.* and interest thereon, by instalments of 16*l.* 3*s.* 2*d.* payable quarterly as therein mentioned; and G. W. Turner thereby agreed to become tenant to the defendants, their heirs or assigns, of the hereditaments and premises thereby appointed and conveyed, thenceforth during their will, at the clear net

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yearly rent of 66*l.*, payable on the usual quarterly days, namely, &c., subject to the powers of distress and entry for non-payment thereof, and to all usual remedies as in leases of like property. Averment: that G. W. Turner held and enjoyed the messuage and premises as tenant thereof to the defendants under the deed and lease aforesaid and the agreement contained therein, from the time of the making of the said deed and lease until the time of his death, and that the plaintiff, as administratrix of G. W. Turner, was in possession of and held and enjoyed the messuage and premises from the death of G. W. Turner until and at the time of the detention and committing of the alleged grievances; and that, at the time of the death of G. W. Turner, a large sum of the rent aforesaid became and was due and in arrear and unpaid to the defendants, and the same so continued due and in arrear and unpaid at the time of the detention and committing of the alleged grievances; and that the goods in the declaration mentioned were at the time of the detention and committing of the alleged grievances in *437] and upon the messuage and premises: *wherefore the defendants, within six calendar months next after the death of G. W. Turner, and during the continuance of the title and interest of the defendants in the messuage and premises, and while the plaintiff was still in possession of the messuage and premises, took and distrained the goods and detained the same, and committed the acts in the declaration mentioned, according to the form of the statute in such case made and provided, and as they lawfully might for the cause aforesaid, and which detention and grievances are the same detention and grievances whereof the plaintiff complains.

The plaintiff took issue and joined issue respectively on the several pleas; and for a further replication to the 4th plea set out the deed in that plea mentioned, by which G. W. Turner, being the proprietor of shares in The Exeter and West of England Permanent Benefit Building Society, secured to the Society the payment of the quarterly sums payable on account of his shares.

There was also a demurrer to the 4th plea and joinder therein.

Rejoinder. That, before the detention and committing of the grievances complained of, G. W. Turner made default in payment of the sums which, under the rules of the Society, became payable by him on account of the said shares, and in the observance and performance of the rules of the Society, and of the covenants on his part in the deed contained.

Issue on the rejoinder.

There was also a demurrer to the joinder, and joinder therein.

*438] *On the trial of the issues in fact, before Channell, B., at the Summer Assizes for Devonshire in 1861, a verdict was found for the plaintiff for 155*l.*, subject to the following special case.

At the time of the making of the indenture hereinafter next mentioned, G. W. Turner, of, &c., was seised in fee and was also in the occupation of a messuage or dwelling-house with the appurtenances, being No. 14, Castle Street, in the parish of St. Lawrence, in the city of Exeter, and was also the proprietor of five whole shares and one half share in a Benefit Building Society, called The Exeter and West of England Permanent Benefit Building Society, of which Society the defendants were trustees.

By an indenture, bearing date and made the 22d January, A. D. 1857, between and by G. W. Turner, of the one part, and the defendants, therein described as trustees of the Exeter and West of England Permanent Benefit Building Society, of the other part, reciting, among other things, that it had been agreed that 550*l.* should be paid out of the funds of the Society to G. W. Turner, in full satisfaction of his shares, and that in consideration of such payment G. W. Turner had, pursuant to the rules of the Society, agreed to pay unto the Society for the term of fourteen years commencing from the 22d January, 1857, the quarterly sum of 16*l.* 8*s.* 2*d.* in respect of his shares, the first and every subsequent quarterly payment to be made at the times and in manner prescribed by the said rules, and that for securing the quarterly sums and other moneys thereafter to become payable on account of, or with reference to the said shares, and that security respectively, G. W. Turner ^{*had agreed to execute the security intended to be by the re-} [*439] reciting indenture effected, it was witnessed that, in consideration of the sum of 550*l.* advanced out of the funds of the Society, G. W. Turner appointed and conveyed the messuage or dwelling-house, No. 14, Castle Street, with the appurtenances, to the defendants, their heirs and assigns for ever. And it was amongst other things provided that, if G. W. Turner, his heirs, executors, administrators, or assigns, should duly pay unto the Society the several quarterly and other sums which under the rules of the Society should become payable on account of the said shares, and should observe and perform the rules of the Society and the covenants hereinafter contained, it should be lawful for G. W. Turner, his heirs and assigns, to hold and enjoy the said messuage or dwelling-house with the appurtenances, and to receive and take the rents and profits thereof, without disturbance by the defendants or other the trustees or trustee for the time being of the Society; but that, if default should be made in any of the matters aforesaid, it should be lawful for the trustees or trustee for the time being of the Society, to enter into possession or into receipt of the rents and profits of the said messuage or dwelling-house with the appurtenances, and to lease the same as they might think fit, or to sell and dispose of the same, and out of the rents and the proceeds of such sale, amongst other things, to retain the full amount of all payments in arrear, and fines thereon due upon that security, and also of the then value of all future payments payable upon the said shares, and to pay the surplus, if any, unto G. W. Turner, his heirs or assigns. The indenture concluded ^{*with the following clause:} [*440]

"And the said G. W. Turner doth hereby agree to become tenant to the said W. Barnes, &c., their heirs and assigns, or other the trustees or trustee for the time being of the said Society, of the hereditaments and premises hereby appointed and conveyed, henceforth during their will, at the clear net yearly rent of 66*l.* payable on the usual quarterly days, videlicet, &c., subject to the powers of distress and entry for non-payment thereof, and to all usual remedies as in leases of like property. Provided always that no greater principal sum shall be hereby secured than 800*l.*

On the 25th May, 1858, G. W. Turner, intermarried with the plaintiff, then called Ellen Emma Hester Austin. Before the marriage and at the time of the making of the indenture hereinafter next men-

tioned, G. W. Turner and the plaintiff were respectively possessed of certain household furniture and effects, being those comprised therein. By that indenture, bearing date the 25th May, 1858, and made prior to the marriage by and between G. W. Turner of the first part, the plaintiff of the second part, and B. Austin and J. Austin of the third part (B. Austin and J. Austin being respectively the father and brother of the plaintiff), in consideration of the intended marriage, all and singular the household goods and furniture, plate, linen, glass, china, books, prints, pictures, and other household effects of them the said G. W. Turner and the plaintiff respectively were assigned to B. Austin and J. Austin in trust (among other things), after the solemnization of the marriage, to permit the plaintiff to have, hold and enjoy the said furniture and effects for her separate use, free from the control and debts of G. W. Turner.

*The furniture and effects comprised in this indenture
*441] remained in the messuage No. 14, Castle Street, from the solemnization of the marriage of G. W. Turner and the plaintiff until the time of the distress hereinafter mentioned.

During the lifetime of G. W. Turner and the plaintiff, the furniture and effects were used by G. W. Turner and the plaintiff in the said messuage. About five weeks before the death of G. W. Turner, he and the plaintiff went to a watering place near Exeter for the benefit of his health, leaving the servants in care of the said messuage and the furniture and effects. About three weeks before the death of G. W. Turner, the plaintiff's father, with the consent of G. W. Turner and the plaintiff, went to the said messuage for the purpose of protecting it and the furniture and effects; and he remained there for that purpose until the time of the levying of the distress hereinafter mentioned. G. W. Turner died at the watering place on the 16th March, 1860. The plaintiff was with him at the time of his death, and returned to the said messuage on the 18th March, 1860, and remained therein until this action was brought.

G. W. Turner, before his death, had paid to the defendants, as trustees of the Benefit Building Society, the sum of 74*l.* 12*s.* 8*d.* on account of the quarterly sum of 16*l.* 3*s.* 2*d.* agreed to be paid by him in respect of his shares in the Society, and secured by the indenture dated 22d January, 1857, and at the time of his death there was due and in arrear from him to the defendants as such trustees, on account of the quarterly sum of 16*l.* 3*s.* 2*d.*, the sum of 119*l.* 5*s.* 4*d.*

*On the 17th March, 1860, being the day following the day
*442] of the death of G. W. Turner, one of the defendants, for himself and the others, and with their authority, signed a warrant of distress addressed to W. Harris, and delivered the same to him, with directions to execute it. The arrears of rent mentioned in that warrant were three years arrears of the sum of 66*l.*, at which it is stated, in the indenture dated the 22d January, 1857, that G. W. Turner agreed to become tenant to the defendants of the messuage or dwelling-house No. 14, Castle Street, at a net yearly rental of that amount, after giving credit for the sum of 74*l.* 12*s.* 8*d.*, paid to the defendants by G. W. Turner in his lifetime on account of the quarterly sum of 16*l.* 3*s.* 2*d.*, agreed to be paid by him in respect of his shares in the Society.

On the said 17th March, Harris, in pursuance and under the authority of the warrant of distress and of the directions given to him, entered into and upon the messuage, and distrained the furniture and effects therein for the alleged arrears of rent. On the 20th March, and whilst Harris continued in possession of the furniture and effects under the distress, the plaintiff, at the request of the defendants, signed and delivered to them a notice in writing, requesting them not to sell the furniture for seven days from that date. On the 22d March, and whilst Harris continued in possession of the furniture and effects under the distress, the plaintiff signed and delivered to the defendants and to Harris a notice that she claimed the furniture and effects under the indenture of the 25th May, 1858, and required them to give up possession of *them. On the same day, and after the service [*443 of that notice, and whilst he still continued in possession of the furniture and effects under the distress, Harris, in further pursuance of the warrant of distress and directions, signed and delivered to the plaintiff the usual notice that he had distrained the goods and chattels for the sum of 123*l.* 7*s.* 4*d.*, being arrears of rent due to the defendants on the 22d of January, 1860, for the house and premises late in the possession of G. W. Turner. The defendants refused to deliver up the furniture and effects, or any part thereof, to the plaintiff pursuant to the notice of the 22d March, 1860, and the request contained therein, and had since retained possession of them.

On the 17th April, 1860, administration, with the will annexed, of the estate and effects of G. W. Turner, deceased, were granted to the plaintiff by the Exeter District Probate Court.

The action was brought by a writ of summons bearing date the 19th June, 1860.

The Court was to be at liberty to draw such inferences from the circumstances set forth in the case as a jury should have drawn in reference as well to the issue upon the plea of not possessed as to the other issues.

The question for the opinion of the Court was, whether, under these circumstances, the plaintiff was entitled to maintain this action. If the Court should be of opinion in the affirmative, then the verdict was to be entered for the plaintiff, but if the Court should be of a contrary opinion, then a nonsuit was to be entered.

Karslake (with him *Kingdon*), for the plaintiff.—*First. The clause in the mortgage deed to secure the payment to become due from the plaintiff's husband to the Benefit Building Society did not create a tenancy between him and the defendants on which a distress would lie: *Walker v. Giles*, 6 C. B. 662 (E. C. L. R. vol. 60), recognised in *Barnard v. Pilsworth*, Id. 698, note (a). This deed is, in its terms, precisely similar to the deed in the former case: and the principle of the decision there is applicable here, viz., that it was inconsistent with the object of the deed that the mortgagor, before default in payment of the contributions, should become tenant, and so liable to be distrained upon for rent, that therefore one of the clauses must be rejected, and the Court thought that they best carried out the intention of the parties by rejecting the clause giving the power of distress. [CROMPTON, J.—In that case, Maule, J., said, p. 694: "When one sees the parties expressly agreeing to become tenants,

one would incline to construe the instrument as creating a tenancy, unless there was some manifest absurdity or great inconvenience in so doing. It is enough for the purpose of your argument to say, that, though this instrument might create a *tenancy*, it is not such a tenancy as will support the second avowry, viz., a tenancy at the yearly rent of 200*l.*"] In Pinhorn *v.* Souster, 8 Exch. 763, there was an additional clause, providing that the mortgagee should apply the rent when received in satisfaction of principal and interest. [CROMPTON, J.—That is in effect provided for by this deed.] In Pinhorn *v.* Souster, Parke, B., said, p. 772, "As there is no inconsistency in this *clause, we need not strike it out, as the Court of Common Pleas thought themselves compelled to do in Walker *v.* Giles." If any tenancy is created, it is a tenancy at will only, and the reservation of a yearly rent is not inconsistent with it: Doe *d.* Dixie *v.* Davies, 7 Exch. 89, 91, per Parke, B. [CROMPTON, J.—In note (a) to Walker *v.* Giles, 6 C. B. 701, it is said, "Similar clauses are, however, frequently used by conveyancers, without any doubt as to their efficacy; and a passage from Jarman's Conveyancing, vol. 5, p. 528, a book of very great authority, is cited, in which a power of distress is preferred to a demise at will, 'inasmuch as a demise at will is liable to be determined by the death, and at the will (a) of either party, and, it is conceived, subjects the deed to a lease stamp.' (Bythewood and Jarman's Precedents in Conveyancing, vol. 5, p. 514, 3d ed. by Sweet.) It is part of this deed, as well as of the deed in Walker *v.* Giles, 6 C. B. 662 (E. C. L. R. vol. 60), that the mortgagor shall take the rents and profits until default in payment of the quarterly sums. BLACKBURN, J.—It cannot be a tenancy at the will of a lessor if the tenant is entitled to retain possession beyond the will of the lessor. CROMPTON, J.—If the ground of the decision in Walker *v.* Giles was that a power to remain in possession until default is inconsistent with a tenancy at the will of the other party, we should leave that question to be debated in a Court of error.]

Secondly, assuming that a tenancy at will was created between Turner and the defendants, it was determined by the death of G. W. Turner, and therefore the power of distress attached to it was gone, which is the objection to making a demise at will to the mortgagor *446] stated by Mr. Jarman in Bythewood and Jarman's *Precedents in Conveyancing, vol. 5, p. 515, 3d ed. by Sweet. Stat. 8 Ann. c. 14, s. 7 provides that the distress given by sect. 6, after the determination of the lease, shall be made within six calendar months, "and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due." [CROMPTON, J.—In Braithwaite *v.* Cooksey, 1 H. Bl. 465, it was held that the distress might be made during the possession of the administrator of the tenant.] In that case the term continued after the death of the tenant, and the administrator continued in possession during the remainder of the term and after the expiration of it. But the reasons for the judgment are not given, and it is doubtful whether it can be supported. The plaintiff here did not become administratrix until after the distress, and there was nothing upon which the letters of administration could operate.

a) 6 C. B. 662 (E. C. L. R. vol. 60).

Coleridge (with him Field), for the defendants.—First, Turner was made tenant by the express words of the deed. The reason of the judgment in *Walker v. Giles*, 6 C. B. 662 (E. C. L. R. vol. 60), which was upon a deed containing the same words as the present, appears to have been that, by holding that there was a tenancy, the money might be paid twice: but the clause creating the tenancy in truth only gives the mortgagee a further security for the payment of the interest, as is pointed out by Mr. Jarman in *Bythewood and Jarman's Precedents in Couveyancing*, p. 514, 3d ed. by Sweet. And there is no such repugnancy between the clauses of the deed as is suggested; because where there is a covenant in a mortgage deed that the *mortgagor shall remain in possession until default in payment of the mortgage money, he has until default an interest in the nature of a term of years; note to *Keech v. Hall*, 1 Smith's L. C. 509-510, 5th ed.; though after default he becomes tenant at will; 4 Com. Dig. by Hammond 99, *Estates by Grant* (H. 1). The effect of the deed is that the mortgagor executes the use in fee in the trustees. [CROMPTON, J.—But subject to the proviso which, from its nature, is to take effect before the conveyance in fee. From whom did W. Turner get his estate as tenant?] He occupied on the terms of the deed on a parol demise. *Walker v. Giles*, 6 C. B. 662 (E. C. L. R. vol. 60), was discountenanced in *Pinhorn v. Souster*, 8 Exch. 763, and *Brown v. The Metropolitan Counties Life Assurance Society*, 1 E. & E. 832 (E. C. L. R. vol. 102). [CROMPTON, J.—In the latter case, p. 836, we say, "The case of *Walker v. Giles* can be only supported, if at all, on the ground pointed out by Lord Wensleydale in *Pinhorn v. Souster*." I do not, however, put much weight upon that dictum, because I rather think it was my own expression, my impression at the time being that the authority of *Walker v. Giles* was very much shaken.] The Court also there say "We do not at all assent to the proposition that there was no tenancy."

Secondly, assuming that there was a tenancy, and admitting that there was no more than a tenancy at will, the holding continued in the person of the widow, and therefore the defendants could distrain by virtue of stat. 8 Ann. c. 14. The words of the proviso in sect. 7 are peculiar, and, when closely looked at, apply to such a case as this. The distress was made within "six calendar months after the determination of the lease;" *and the death of the tenant is an ordinary determination of a tenancy at will, and there is no exception of such in the proviso. Then *Braithwaite v. Cooksey*, 1 H. Bl. 467, is an authority that the possession of the tenant from whom the arrears became due need not be personal, but may be by a representative of the tenant. [BLACKBURN, J.—Here G. W. Turner being tenant in fee of the house, his administratrix would have no more estate in it than a stranger would have; the right to take possession was therefore in the heir, and not in the plaintiff. The grant of letters of administration has the effect of vesting leasehold property in the administrator by relation to the time of the death of the intestate, so as to enable him to bring actions in respect of that property for all matters affecting the same subsequent to the death of the intestate; *Lessee of Patten v. Patten*, Alcock & Nap. 493, cited in 2 Selw. N. P. 698, 12th ed. [CROMPTON, J., cited 1 Williams' Executors, 558, note (p), 5th ed.,

referring to *Rex v. Horsley*, 8 East 410, per Lord Ellenborough, and *Selw. N. P.* 717, 6th ed.] In 1 Williams' Executors 557, 5th ed., it is said, "An administrator may have an action of trespass or trover for the goods of the intestate taken by one before the letters granted unto him; otherwise there would be no remedy for this wrong-doing." In *Foster v. Bates*, 12 M. & W. 226, where goods had been sold after the death of the intestate, and before the grant of letters of administration, avowedly on account of the estate of the intestate, by one who had been his agent, it was held that the administrator might ratify the sale and recover the price from the vendee in *assumpsit* for goods sold and delivered. The rights and ^{*449]} liabilities of an administrator ought to be correlative. [BLACKBURN, J.—Administration may be taken out by creditors and others; it would carry the doctrine of relation very far to say that in such cases there might be a distress upon premises in the occupation of an administrator many years after the death of the intestate.]

Karslake was not called upon to reply.

CROMPTON, J.—Two points have been ably pressed for the defendant: first, that we are bound by the case of *Walker v. Giles*, 6 C. B. 662 (E. C. L. R. vol. 60); secondly, that the present case is within the decision in *Braithwaite v. Cooksey*, 1 H. Bl. 465.

As to the first point, I have my own opinion of the case of *Walker v. Giles*; but it is the general rule to follow the decision of a Court of co-ordinate jurisdiction, and therefore I should not like to overrule that case, which was decided by great judges, without further consideration; and I admit that there is something like incongruity in the two clauses of the deed. I have, however, so strong an opinion on the second point in favour of the plaintiff, that I will not discuss the first point further than to say that I adhere to the great doubts which we expressed on a similar deed in *Brown v. The Metropolitan and General Counties Life Assurance Society*, 1 E. & E. 832 (E. C. L. R. vol. 102). If parties come to an agreement that one shall be tenant to the other, and the nature of the tenancy is expressed, and a power of distress given, it would seem that, however the agreement may operate in a particular case,—whether as a ^{*450]} limitation of the use under the Statute of Uses, as I rather think it does, or whether it can be supported as giving the party occupation as tenant under the terms of the deed, or as a re-demise,—in any view of the case it would be a tenancy at will; and then it is expressly within the authority of *Walker v. Giles*, where such a tenancy was held to be incompatible with the object of the deed.

As to the other point,—assuming Turner to have been tenant at will of the defendants, I am of opinion that the plaintiff is entitled to judgment on the ground that the case is not within the provisions of stat. 8 Ann. c. 14. At common law a landlord could only distrain when there was a tenancy; there could be no *avowry* except on a tenancy. To remedy that, stat. 8 Ann. c. 14, s. 6, was enacted; but that enactment is carefully accompanied with a proviso in sect. 7, that the distress shall be made while the tenant from whom the rent accrued due remains in possession. It is a hard thing, as my brother Blackburn pointed out, that a stranger's goods should be taken for such arrears of rent, and it is not likely that they would be upon the

premises as long as the tenant remained in possession. Therefore it is important that the right of distress should be confined to the continuance of the possession of the tenant from whom the arrears became due. The enactment is, that "from and after the said first day of May, 1710, it shall and may be lawful, for any person or persons, having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might *have done, if such lease or leases had not been ended or determined." Now this case would be within [*451] those words, because on the death of Turner the lease was determined. Then there is a proviso in the next section that such distress must be made "within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due." It is impossible to say, without some authority to that effect, that, the tenant being dead, the possession of the person from whom the arrears accrued due is continued in the present case.

In *Braithwaite v. Cooksey*, 1 H. Bl. 465, indeed the Court allowed a distress to be good during the possession of the administratrix; but they do not give any reasons for their judgment, and it seems to have been a peculiar case,—the tenancy was not determined by the death of the lessee, but continued after his death, so that his administratrix became tenant under the lease; whence it is clear that a distress would lie for rent which, accruing in the lifetime of the lessee, did not fall due until after his death and in the time of the tenancy of the administratrix; and that may have been such a case. If this is not an explanation of that case, I cannot agree that, when a tenancy has been determined by the death of the tenant, arrears of rent may be distrained for, within the words of sect. 7, "during the possession of the tenant from whom such arrears became due."

The present case is also distinguishable from *Braithwaite v. Cooksey* on the ground that there was no possession by any representative of the tenant at the time when the act, otherwise illegal, was done by the defendant. It is true the plaintiff afterwards took out *ad-[*452]ministration, but I doubt whether the defendant can say that the wrongful act of the plaintiff in taking possession was converted into a rightful one by relation. There are cases in which a wrongful act may become rightful by relation, but it is not necessary to say whether this is one of them, because, even if the plaintiff had been in possession as administratrix, this case would not be within the statute.

BLACKBURN, J.—I am of the same opinion. If it was necessary to consider whether *Walker v. Giles*, 6 C. B. 662 (E. C. L. R. vol. 80), is still a binding authority, I should require time to consider the matter very carefully before I said that it was not. But it is not necessary, because, assuming that the authority of that case has been so shaken as not to be binding upon us, the utmost effect which can be given to the deed is, that Turner during his lifetime became tenant at will, subject to a rent which might be distrained for. It would be an enormous mischief if we were to hold, contrary to the fact, that the payment of interest under a mortgage deed turned the possession

of the mortgagor into a tenancy from year to year, requiring six months' notice before the mortgagee could enter into possession.

Treating this then as a tenancy at will, it terminated on the death of the tenant, and the only question is whether, after the tenancy at will had been determined by the death of the tenant, the defendants could distrain goods on the demised premises by virtue of stat. 8 Ann. c. 14. Sect. 6 of that statute recites: "Whereas tenants *pur auter vie* and lessees for years or at will, frequently hold over the tenements to them demised, after the determination of such leases: and whereas after the determination of such, or any other leases, no distress can by law be *made for any arrears of rent that grew due on such *453] respective leases before the determination thereof." The mischief for which the statute intends to provide a remedy is the tenant holding over; and, there being no power of distraining in that case, the enacting part gives a power to any person "having any rent in arrear or due upon any lease for life or lives, or for years or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases," in the same manner as if they had not been determined. And then comes the proviso on which the question turns, the important words of which are, that the distress must be made "during the possession of the tenant from whom such arrears became due." In this case, the arrears became due from Turner in his lifetime: the premises were not in his possession after his death; and therefore the possession was not in him from whom the arrears became due. It is true that the widow and household servants continued in the house at the time of the distress, but they had no right to do so; and they were not the tenant from whom the arrears became due. The possession contemplated by the statute, though a wrongful possession, must be a possession by the tenant from whom the arrears became due; and the possession in this case was not his.

The widow indeed afterwards took out administration, and so far represented her deceased husband. But even if she had been administratrix at the time of the distress, she would not have been in possession as administratrix, nor have had any right to be in possession as such. Mr. Coleridge argued, that because there is a right of action in an administrator to sue for rent, the letters of administration, when *454] granted, related back so as to render *her possession the possession of her deceased husband who was tenant. I do not think that even the executrix, if she had taken out probate, would have represented the tenant for this purpose. But it is not necessary to decide that. In Braithwaite v. Cooksey, 1 H. Bl. 465, there was a lease for years, and the administratrix continued rightfully in possession under the lease after the death of the lessee; and how far in such a case they may be identified with the testator as one tenant is a question which, if it arose then, has not arisen since: and it does not arise in the present case, because, from the peculiar terms of the deed, there was a tenancy in which Turner was tenant at will in the strict sense of the term, and his administratrix never had anything in the tenancy. It is sufficient to say this distress is unlawful on the ground that it was not made during the possession of the person as tenant from whom the arrears become due.

MELLOR, J.—I say nothing about Giles v. Walker, 6 C. B. 682 (E.

C. L. R. vol. 60), as it is unnecessary to do so. I found my judgment upon the question whether the distress under the circumstances was lawful. At common law, a distress after the determination of the tenancy could not be made, and stat. 8 Ann. c. 14 came in to the relief of landlords in certain cases; but, to entitle the defendants to succeed under that statute, which enables landlords who have rent in arrear to distrain after the expiration of the term or interest of the tenant, they must bring themselves within the conditions in the 7th section, one of which is, that the distress must be made "during the possession of the tenant from whom such arrears became due."

It is admitted that this was a tenancy at will which *expired on the death of the tenant, and therefore there was nothing for the administratrix to represent by her subsequent possession. I think the case of *Braithwaite v. Cooksey*, 1 H. Bl. 465, has been explained by my brother Crompton, supposing his suggestion to be correct as to the facts of it. At any rate that case is distinguishable, because the tenancy did not, as in this, expire with the death of the tenant; there was a period when in a representative character the administratrix occupied as tenant; and therefore her occupation might be considered the same as that of the tenant. In this case the tenancy or interest ceased on the death of the tenant, and on that ground the distress was unlawful.

CROMPTON, J.—I wish to add that the recital of sect. 6, to which my brother Blackburn, has referred, is strongly in favour of our judgment as showing that the mischief contemplated by the statute was one arising during the tenancy of the lessee himself. This recital, coupled with the condition in sect. 7, makes it clear to my mind that the statute was not intended to apply to cases where the tenancy was determined by the death of the tenant.

Judgment for the plaintiff.

The phrase "during the possession of the tenant from whom such arrears became due," upon which the principal case turned, was omitted in the Pennsylvania Statute of March 21st 1772, which re-enacts the statute 8 Ann. c. 14: *Clifford v. Beems*, 3 Watts 246; and goods which were fraudulently or clandestinely removed from the premises were allowed to be distrained within thirty days, wherever they might be found: Sect. 4. A removal in the daytime, without the knowledge of the landlord, and during his absence, does not make the act fraudulent; and if the goods thus removed are seized and sold by a creditor of the tenant, the landlord cannot come in upon the fund to recover a year's rent, as this is a statutory equivalent for his right of distress, and can be claimed only when he could distrain: *Grant & M'Lane's Appeal*, 8 Wright (1863) 477. But so long as the landlord retains his right to distrain, though the rent in arrear had accrued three years prior to the execution, he is entitled to be paid out of the proceeds of the sale: *Mors's Appeal*, 11 Casey (1860) 162.

that he disputed, under the third proviso of sect. 7 of stat. 53 G. 3, c. 127, the validity of the rate, and the liability of Elisha Balley to pay the same. No notice of any objection to the validity of the rate, or of the liability of Elisha Balley to pay the same, was given to the magistrates at the hearing by Elisha Balley or his attorney other than or at any other time than the notice above mentioned. The magistrates were of opinion that their jurisdiction was taken away by that enactment, and declined to make an order upon Elisha Balley for payment.

Barrow, in support of the application.—By the third proviso in sect. 7 of stat. 53 G. 3, c. 127, “if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment *thereupon.” *433] But it was not intended that the party summoned should argue the case before the magistrates, and take the chance of a decision in his favour, and then, on finding that their judgment was likely to be against him, withdraw the matter from their jurisdiction by a bare announcement that he disputed the rate or his liability to pay it. If a party intends to avail himself of this proviso, he should give notice that he disputes the validity of the rate or his liability to pay it when the case is called on. The objection taken and argued before the magistrates, that the summons was irregular and informal, was one exclusively for their decision; and therefore the defendant having submitted the case to the jurisdiction of the magistrates could not afterwards withdraw it from them. [He cited *Reg. v. The Justices of Salop*, 29 L. J. M. C. 39.(a)]

COCKBURN, C. J.—This case is different from the case cited, where this Court refused to grant a certiorari to remove an order for payment of a church rate, the notice of disputing the validity of the rate having been given after a formal objection to the rate had been argued and the magistrates had decided upon it. Here the party summoned intended bona fide to dispute the validity of the rate, and gave notice thereof prior to the decision of the magistrates upon the points which had been argued, and they acquiesced in the bona fides of the objection, and held their hands. Under these circumstances it would be a strong thing for this Court to command them to make an order enforcing payment of the rate. I think therefore we ought not to interfere.

*434] *CROMPTON*, J.—I think that in this case the objection was taken in time to enable the magistrates to forbear giving judgment. When a person summoned before magistrates has taken an objection and invited them to decide upon it, and they have done so, this Court will not issue the prerogative writ of certiorari to bring up their order. But here the magistrates, thinking that the objection was bona fide taken, have borne giving their judgment, and we ought not to compel them.

BLACKBURN, J.—I think the distinction between this case and the case cited is that mentioned by my brother Crompton. In that case the objection under stat. 53 G. 3, c. 127, s. 7, was not taken until after the magistrates had decided: here the notice was given before any

(a) S. C. nom. *Reg. v. Wicksted and another, Justices of Salop*, 6 Jur. N. S. 143.

determination by the magistrates, and when there was full time for them to forbear giving their judgment.

MELLOR, J.—The argument that the party summoned in this case is not within the proviso to sect. 7 of stat. 58 G. 3, c. 127, because, to some extent, he allowed the magistrates to go into the inquiry, is answered by the consideration that it is convenient that the magistrates should hear what objections are made to the rate. The proviso only requires that notice shall be given before the *decision*; and here the magistrates declined to make an order, because they believed that the objection was made bona fide.

Rule refused.

*HELEN EMMA HESTER TURNER v. WILLIAM [**435
BARNES and Others. April 25.

Mortgage deed.—Building Society.—Tenancy at will.—Distress.—8 Ann. c. 14, ss. 6, 7.

By indenture between G. W. T., proprietor of shares in a Building Society, and the defendants, trustees of the Society, reciting, among other things, that G. W. T. had, pursuant to the rules of the Society, agreed to pay into the Society for the term of fourteen years, the quarterly sum of 16*l.* 3*s.* 2*d.* in respect of his shares; and that for securing the quarterly payments he had agreed to execute the security intended to be effected by that indenture, G. W. T. conveyed a house, of which he was seized in fee, to the defendants in fee. The deed contained a proviso for quiet enjoyment by G. W. T. if he paid the quarterly sums, &c., and observed the rules of the Society and the covenants in the deed; but that in case he made default the defendants might enter, and lease or sell the house, and out of the proceeds retain the amount of payments in arrear, &c., and pay the surplus, if any, to G. W. T.; and a clause by which G. W. T. agreed to become tenant of the house to the defendants, their heirs or assigns, or other the trustee or trustees for the time being of the Society, thenceforth during their will, at the clear net yearly rent of 6*l.*, payable on the usual quarterly days, subject to the powers of distress and entry for non-payment thereof, and to all usual remedies as in leases of like property. G. W. T. died, leaving payments in arrear; the defendants distrained upon the goods in the house, which was in the occupation of his widow, who subsequently took out administration.

1. *Quare*, whether the deed created the relation of landlord and tenant between the parties? But assuming that it did, held that, the tenancy under the mortgage being at most only a tenancy at will, the distress was not made during the possession of the tenant from whom the rent became due within the proviso in sect. 7 of stat. 8 Ann. c. 4, and therefore was not justified under sect. 6 of that Act.

2. *Quare* of the decision in Walker v. Giles, 6 C. B. 662.

THE first count of the declaration was for the detention of the plaintiff's goods, that is to say, household furniture, and other chattels and effects of the like nature. The second count was for the conversion of the same goods.

Pleas.—1. To the first count, a traverse of the detention. 2. To the second count, not guilty by statute 11 G. 2, c. 19, s. 21. 3. To the whole *declaration, that the goods were not the plaintiff's. [**436 A 4. To the whole declaration, that G. W. Turner by deed conveyed a messuage and hereditaments then in his occupation and possession to the defendants, their heirs and assigns, by way of mortgage for securing payment of the sum of 550*l.* and interest thereon, by instalments of 16*l.* 3*s.* 2*d.* payable quarterly as therein mentioned; and G. W. Turner thereby agreed to become tenant to the defendants, their heirs or assigns, of the hereditaments and premises thereby appointed and conveyed, thenceforth during their will, at the clear net

yearly rent of 66*l.*, payable on the usual quarterly days, namely, &c., subject to the powers of distress and entry for non-payment thereof, and to all usual remedies as in leases of like property. Averment: that G. W. Turner held and enjoyed the messuage and premises as tenant thereof to the defendants under the deed and lease aforesaid and the agreement contained therein, from the time of the making of the said deed and lease until the time of his death, and that the plaintiff, as administratrix of G. W. Turner, was in possession of and held and enjoyed the messuage and premises from the death of G. W. Turner until and at the time of the detention and committing of the alleged grievances; and that, at the time of the death of G. W. Turner, a large sum of the rent aforesaid became and was due and in arrear and unpaid to the defendants, and the same so continued due and in arrear and unpaid at the time of the detention and committing of the alleged grievances; and that the goods in the declaration mentioned were at the time of the detention and committing of the alleged grievances in *437] and upon the messuage and premises: *wherefore the defendants, within six calendar months next after the death of G. W. Turner, and during the continuance of the title and interest of the defendants in the messuage and premises, and while the plaintiff was still in possession of the messuage and premises, took and distrained the goods and detained the same, and committed the acts in the declaration mentioned, according to the form of the statute in such case made and provided, and as they lawfully might for the cause aforesaid, and which detention and grievances are the same detention and grievances whereof the plaintiff complains.

The plaintiff took issue and joined issue respectively on the several pleas; and for a further replication to the 4th plea set out the deed in that plea mentioned, by which G. W. Turner, being the proprietor of shares in The Exeter and West of England Permanent Benefit Building Society, secured to the Society the payment of the quarterly sums payable on account of his shares.

There was also a demurrer to the 4th plea and joinder therein.

Rejoinder. That, before the detention and committing of the grievances complained of, G. W. Turner made default in payment of the sums which, under the rules of the Society, became payable by him on account of the said shares, and in the observance and performance of the rules of the Society, and of the covenants on his part in the deed contained.

Issue on the rejoinder.

There was also a demurrer to the joinder, and joinder therein.

*438] *On the trial of the issues in fact, before Channell, B., at the Summer Assizes for Devonshire in 1861, a verdict was found for the plaintiff for 155*l.*, subject to the following special case.

At the time of the making of the indenture hereinafter next mentioned, G. W. Turner, of, &c., was seised in fee and was also in the occupation of a messuage or dwelling-house with the appurtenances, being No. 14, Castle Street, in the parish of St. Lawrence, in the city of Exeter, and was also the proprietor of five whole shares and one half share in a Benefit Building Society, called The Exeter and West of England Permanent Benefit Building Society, of which Society the defendants were trustees.

By an indenture, bearing date and made the 22d January, A. D. 1857, between and by G. W. Turner, of the one part, and the defendants, therein described as trustees of the Exeter and West of England Permanent Benefit Building Society, of the other part, reciting, among other things, that it had been agreed that 550*l.* should be paid out of the funds of the Society to G. W. Turner, in full satisfaction of his shares, and that in consideration of such payment G. W. Turner had, pursuant to the rules of the Society, agreed to pay unto the Society for the term of fourteen years commencing from the 22d January, 1857, the quarterly sum of 16*l.* 3*s.* 2*d.* in respect of his shares, the first and every subsequent quarterly payment to be made at the times and in manner prescribed by the said rules, and that for securing the quarterly sums and other moneys thereafter to become payable on account of, or with reference to the said shares, and that security respectively, G. W. Turner *had agreed to execute the security intended to be by the re-citing indenture effected, it was witnessed that, in consideration of the sum of 550*l.* advanced out of the funds of the Society, G. W. Turner appointed and conveyed the messuage or dwelling-house, No. 14, Castle Street, with the appurtenances, to the defendants, their heirs and assigns for ever. And it was amongst other things provided that, if G. W. Turner, his heirs, executors, administrators, or assigns, should duly pay unto the Society the several quarterly and other sums which under the rules of the Society should become payable on account of the said shares, and should observe and perform the rules of the Society and the covenants hereinafter contained, it should be lawful for G. W. Turner, his heirs and assigns, to hold and enjoy the said messuage or dwelling-house with the appurtenances, and to receive and take the rents and profits thereof, without disturbance by the defendants or other the trustees or trustee for the time being of the Society; but that, if default should be made in any of the matters aforesaid, it should be lawful for the trustees or trustee for the time being of the Society, to enter into possession or into receipt of the rents and profits of the said messuage or dwelling-house with the appurtenances, and to lease the same as they might think fit, or to sell and dispose of the same, and out of the rents and the proceeds of such sale, amongst other things, to retain the full amount of all payments in arrear, and fines thereon due upon that security, and also of the then value of all future payments payable upon the said shares, and to pay the surplus, if any, unto G. W. Turner, his heirs or assigns. The indenture concluded *with the following clause: "And the said G. W. Turner doth hereby agree to become tenant to the said W. Barnes, &c., their heirs and assigns, or other the trustees or trustee for the time being of the said Society, of the hereditaments and premises hereby appointed and conveyed, henceforth during their will, at the clear net yearly rent of 66*l.* payable on the usual quarterly days, videlicet, &c., subject to the powers of distress and entry for non-payment thereof, and to all usual remedies as in leases of like property. Provided always that no greater principal sum shall be hereby secured than 800*l.*

On the 25th May, 1858, G. W. Turner, intermarried with the plaintiff, then called Ellen Emma Hester Austin. Before the marriage and at the time of the making of the indenture hereinafter next men-

tioned, G. W. Turner and the plaintiff were respectively possessed of certain household furniture and effects, being those comprised therein. By that indenture, bearing date the 25th May, 1858, and made prior to the marriage by and between G. W. Turner of the first part, the plaintiff of the second part, and B. Austin and J. Austin of the third part (B. Austin and J. Austin being respectively the father and brother of the plaintiff), in consideration of the intended marriage, all and singular the household goods and furniture, plate, linen, glass, china, books, prints, pictures, and other household effects of them the said G. W. Turner and the plaintiff respectively were assigned to B. Austin and J. Austin in trust (among other things), after the solemnization of the marriage, to permit the plaintiff to have, hold and enjoy the said furniture and effects for her separate use, free from the control and debts of G. W. Turner.

*The furniture and effects comprised in this indenture
*441] remained in the messuage No. 14, Castle Street, from the solemnization of the marriage of G. W. Turner and the plaintiff until the time of the distress hereinafter mentioned.

During the lifetime of G. W. Turner and the plaintiff, the furniture and effects were used by G. W. Turner and the plaintiff in the said messuage. About five weeks before the death of G. W. Turner, he and the plaintiff went to a watering place near Exeter for the benefit of his health, leaving the servants in care of the said messuage and the furniture and effects. About three weeks before the death of G. W. Turner, the plaintiff's father, with the consent of G. W. Turner and the plaintiff, went to the said messuage for the purpose of protecting it and the furniture and effects; and he remained there for that purpose until the time of the levying of the distress hereinafter mentioned. G. W. Turner died at the watering place on the 16th March, 1860. The plaintiff was with him at the time of his death, and returned to the said messuage on the 18th March, 1860, and remained therein until this action was brought.

G. W. Turner, before his death, had paid to the defendants, as trustees of the Benefit Building Society, the sum of 74*l.* 12*s.* 8*d.* on account of the quarterly sum of 16*l.* 3*s.* 2*d.* agreed to be paid by him in respect of his shares in the Society, and secured by the indenture dated 22d January, 1857, and at the time of his death there was due and in arrear from him to the defendants as such trustees, on account of the quarterly sum of 16*l.* 3*s.* 2*d.*, the sum of 119*l.* 5*s.* 4*d.*

*On the 17th March, 1860, being the day following the day
*442] of the death of G. W. Turner, one of the defendants, for himself and the others, and with their authority, signed a warrant of distress addressed to W. Harris, and delivered the same to him, with directions to execute it. The arrears of rent mentioned in that warrant were three years arrears of the sum of 66*l.*, at which it is stated, in the indenture dated the 22d January, 1857, that G. W. Turner agreed to become tenant to the defendants of the messuage or dwelling-house No. 14, Castle Street, at a net yearly rental of that amount, after giving credit for the sum of 74*l.* 12*s.* 8*d.*, paid to the defendants by G. W. Turner in his lifetime on account of the quarterly sum of 16*l.* 3*s.* 2*d.*, agreed to be paid by him in respect of his shares in the Society.

On the said 17th March, Harris, in pursuance and under the authority of the warrant of distress and of the directions given to him, entered into and upon the messuage, and distrained the furniture and effects therein for the alleged arrears of rent. On the 20th March, and whilst Harris continued in possession of the furniture and effects under the distress, the plaintiff, at the request of the defendants, signed and delivered to them a notice in writing, requesting them not to sell the furniture for seven days from that date. On the 22d March, and whilst Harris continued in possession of the furniture and effects under the distress, the plaintiff signed and delivered to the defendants and to Harris a notice that she claimed the furniture and effects under the indenture of the 25th May, 1858, and required them to give up possession of *them. On the same day, and after the service [*443 of that notice, and whilst he still continued in possession of the furniture and effects under the distress, Harris, in further pursuance of the warrant of distress and directions, signed and delivered to the plaintiff the usual notice that he had distrained the goods and chattels for the sum of 123*l.* 7*s.* 4*d.*, being arrears of rent due to the defendants on the 22d of January, 1860, for the house and premises late in the possession of G. W. Turner. The defendants refused to deliver up the furniture and effects, or any part thereof, to the plaintiff pursuant to the notice of the 22d March, 1860, and the request contained therein, and had since retained possession of them.

On the 17th April, 1860, administration, with the will annexed, of the estate and effects of G. W. Turner, deceased, were granted to the plaintiff by the Exeter District Probate Court.

The action was brought by a writ of summons bearing date the 19th June, 1860.

The Court was to be at liberty to draw such inferences from the circumstances set forth in the case as a jury should have drawn in reference as well to the issue upon the plea of not possessed as to the other issues.

The question for the opinion of the Court was, whether, under these circumstances, the plaintiff was entitled to maintain this action. If the Court should be of opinion in the affirmative, then the verdict was to be entered for the plaintiff, but if the Court should be of a contrary opinion, then a nonsuit was to be entered.

Karslake (with him *Kingdon*), for the plaintiff.—*First. The [*444 clause in the mortgage deed to secure the payment to become due from the plaintiff's husband to the Benefit Building Society did not create a tenancy between him and the defendants on which a distress would lie: *Walker v. Giles*, 6 C. B. 662 (E. C. L. R. vol. 80), recognised in *Barnard v. Pilsworth*, Id. 698, note (a). This deed is, in its terms, precisely similar to the deed in the former case: and the principle of the decision there is applicable here, viz., that it was inconsistent with the object of the deed that the mortgagor, before default in payment of the contributions, should become tenant, and so liable to be distrained upon for rent, that therefore one of the clauses must be rejected, and the Court thought that they best carried out the intention of the parties by rejecting the clause giving the power of distress. [CROMPTON, J.—In that case, Maule, J., said, p. 694: "When one sees the parties expressly agreeing to become tenants,

the ship was not worth repairing; and I should be sorry to extend the doctrine of constructive total loss. Therefore this must be taken to be an average loss.

On the other questions the parties appear to be agreed.

BLACKBURN, J.—(The only other Judge present.) I also am of opinion that our judgment ought to be for the defendant. It is for us to draw inferences of fact from the matters stated. This ship was, by perils of the sea, driven into a port at the Mauritius in such a state that unless money was expended upon her she could not have been saved. It is a fixed and well ascertained rule of mercantile law that when a ship is, by perils of the sea, thrown into such a situation that it requires expenditure of money to make her a ship again,—“if,” in the language of Maule, J., in *Smith v. Moss*, 9 C. B. 94, 103 (E. C. L. R. vol. 67), “the ship, when repaired, will not be worth *the sum which it would be necessary to expend upon her” (see also the judgment of the Court delivered by Jervis, C. J., in *Rosetto v. Gurney*, 11 C. B. 176, 186 (E. C. L. R. vol. 78)), or, as it is sometimes worded, if the expense of the necessary repairs of the ship is greater than the value of the ship when repaired; or (which is the same thing though not so strictly accurate) if a prudent uninsured owner under such circumstances would not repair the ship, then the loss amounts to a constructive total loss. The question in the present case is, whether this was so. The arbitrator finds that 10,500*l.* would have made the ship as good as she was at the time she encountered the perils which drove her to the Mauritius. That brings us to the question, Would the value of the ship when repaired, or would it not, exceed the 10,500*l.*—would a prudent uninsured owner, who knew that by expending 10,500*l.* he would get a ship as good when repaired as she was before the damage, spend the 10,500*l.* or not? On that the arbitrator finds two sets of facts, first, he finds that the cost of building the ship would have been 20,000*l.*, though, after the five years' wear and tear, the fair deduction from the cost price would be 20*l.* per cent., and consequently 16,000*l.* would be the value of the ship. He also finds that the ship, at the time when the risk commenced, would have sold for 7500*l.*, or as he words it, “the value of the ship to sell when the risk on the policy commenced was 7500*l.*”; and he says that, after the repairs, assuming them to have been properly executed, her value would have been the same. He explains this by saying, “The Acadia was a vessel of exceptional size and class, and her value at any time to sell would depend very materially upon whether the sale were at *the instance of an owner anxious to sell or of a buyer anxious to purchase. The value above stated, assuming the repairs to have been completed, is what the ship would have realized if sold by an owner anxious to sell at the period in question, when the market for all kinds of shipping was in a very depressed state.” Then he proceeds, “An owner wanting such a ship for the particular purposes of his trade at the time when The Acadia was sold, and having to elect to sell, to repair, or to purchase, would have elected to repair, for such a ship could neither have been built nor purchased at that time for so small a sum as 10,500*l.*” It is said that it is not found that the plaintiffs were owners who, for the purpose of their trade, wanted to use such a ship; but when we

find that, at the time when the value of the ship to sell is put by the arbitrator at 7500*l.*, the plaintiff's were using it in their trade, and valued her for the purpose of insurance at 17,000*l.*, I think there is material evidence against them that the value of the ship in their estimation was, as the arbitrator puts it, the value of the ship to an owner wanting at that time such a ship for the particular purposes of his trade. And then in determining the question whether there has been a constructive total loss in this case, the ship being of a size and class for which there is no ordinary market, its value, as Mr. Mellish pointed out, is not to be tested by what it would sell for in the market where there are no buyers. If it were necessary to say whether, on these findings, the value was 10,500*l.* or not, one might pause before finding that it was; but, taking the facts together which I have mentioned, I think the assured have not made out affirmatively, which it lies upon them to do, that the expenditure of 10,500*l.* would have produced a *ship the value of which would have fallen [*470 short of 10,500*l.* The arbitrator wanted to know whether, if he had to decide the case, he should value the ship at the seller's or the purchaser's price. I think it is neither: I think the test is, What was the real value of the ship at the time? In the present case, I think the builder's price, that is, the price at which a person could have got such a ship built for him, would have come much nearer to the true value than the selling price; but it is sufficient for the decision of the case to say that it rests on the assured to make out affirmatively that the ship when repaired would not have been worth 10,500*l.* There are phrases in some of the decided cases indicating that it should be shown that the cost of repairs must greatly exceed the value of the ship when repaired, (a)—and that it must not be a measuring cast; and it seems to me that the arbitrator could not, and ought not to have drawn, from the facts which he has stated, the inference that the ship when repaired would not have been worth 10,500*l.*; and unless he so found, the decision ought to be that there was not a constructive total loss.

Judgment for the defendant.

(a) See *Young v. Turing*, in error, 2 M. & Gr. 593, 602 (E. C. L. R. vol. 40), per Lord Abinger. *Irving v. Manning*, in error, 2 C. B. 784, 788 (E. C. L. R. vol. 52), per Pollock, C. B.

The value of a ship, as is stated by Mr. Baily, in an essay upon the subject, 17 Law Magazine, 3d series (1864) 76, varies according to the time at which the estimate is made. If insured, at the time the risk under the policy attached; in case of collision, at the moment preceding the accident; when the shares of part-owners are transferred, at the time of the transfer; and when there is general average, at the time she became liable to contribution. In other respects,

the value of the ship is the same in all cases.

It is necessary to discard the market value as a standard, and resort directly to the constituent elements which go to make up the value of a ship.

1. The cost of building a similar ship at the time when the question arises.

The cost of replacing is a better test than what she will fetch in the market, especially if she were built for any particular purpose.

2. The length of such ship's life.

Her value, including future interest on capital, is the money that the owner can yet make out of her whilst she exists as a ship. This would be her net earnings, plus her value to break up.

3. The date when she was built.

4. The difference between the net freight she will earn for one voyage on current rates of freight and on average rates of freight.

The net earnings depend on the freights the owner is justified in expecting, i. e. on the current rates of freight for the next voyage, and on the average rates of freight for such a ship for the remainder of her life, i. e. the freight she can make in the long run.

5. The falling off per annum in her receipts at the latter part of her life, by reason of her age—when there is such falling off.

When, by reason of her age, the rates of freight which she can earn are less than the rates of a similar ship not so old, that fact reduces her present value, as it lowers the average of her profit during the remainder of her life.

On these principles, when a ship lasts five years as a ship, and her cost to build was 5000*l.*, and her proceeds when she is ultimately broken up will be 500*l.*, and her earnings per annum on the last three years of her life will be at the rate of two-thirds only of those per annum of the first two years, by reason of her age, the deductions for age are on (5000*l.* cost, less 500*l.* proceeds) 4500*l.*—25 per cent. for the first year, 50 per cent. for the second year, 66½ per cent. the third year, 83½ per cent. for the fourth year, 100 per cent. for the fifth year—making her value to the owner, when there has not been any alteration in the cost of building such a ship since she was built, and freights are at average rates. At the end of the first year, 5000*l.*,

less 25 per cent. on 4500*l.*, i. e. 3875*l.* At the end of the second year, 5000*l.*, less 50 per cent. on 4500*l.*, i. e. 2750*l.* At the end of the third year, 5000*l.*, less 66½ per cent. on 4500*l.*, i. e. 2000*l.* At the end of the fourth year, 5000*l.*, less 83½ per cent. on 4500*l.*, i. e. 1250*l.* At the end of the fifth year, 5000*l.*, less 100 per cent. on 4500*l.*, i. e. 500*l.*, i. e. her value to break up.

If at the end of the third year the cost of building a similar ship has increased to 6000 <i>l.</i> , and the rate of freight cur- rent at that time gives a net profit, for the next voyage, 300 <i>l.</i> above what average rates of freight would give, her value at the end of the third year is	£6000
Less 66½ per cent. on 5500 <i>l.</i> (6000 <i>l.</i> , less proceeds to break up)	3666
	£2334
Add exceptional profit on freight	300
	£2634

If the cost at which a similar ship can be built has de- creased to 4500 <i>l.</i> , and the rate of freight current at the end of the third year gives a net profit, for the next voy- age, 200 <i>l.</i> less than average rates of freight would give, her value at the end of the third year is	£4500
Less 66½ per cent. on 4000 <i>l.</i> (4500 <i>l.</i> , less proceeds to break up)	2667
	£1833
Deduct exceptional loss on freight	200

*THE QUEEN v. The Rev. JOHN HIGGINSON, Clerk, [*471 and Others, Justices of the North Riding of YORKSHIRE, and the Overseers of the Township of Oversilton. April 28.

Order of removal suspended.—Order for charges.—35 G. 3, c. 101, s. 2.

Upon an application, under stat. 35 G. 3, c. 101, s. 2, for a warrant of distress to levy the charges incurred by the suspension of an order of removal, the justice cannot inquire into the merits of the order directing payment, but is bound to enforce it by issuing his warrant. And this holds even where, by reason of the amount ordered to be paid not exceeding 20*l.*, there is no appeal against the order.

RULE calling upon the Rev. John Higginson, clerk, and two other justices of the North Riding of the county of York, and the overseers of the poor of the township of Oversilton, in that Riding, to show cause why the said justices, or two of them, should not issue their warrant to levy by distress and sale of the goods and chattels of the said overseers the sum of 14*l.* 14*s.*, being the amount of the charges and expenses incurred by the overseers of the poor of the township of South Otterington, in that Riding, for the maintenance of James Yarker, the elder, and his wife and children, under a suspended order for the removal of the paupers from the township of South Otterington to the township of Oversilton.

The order of removal, dated the 30th April, 1860, adjudged that the settlement of James Yarker, the elder, and Elizabeth, his wife, and their two children, Mary Hannah, aged three years, and James, aged six weeks, was in the township of Oversilton. An order of suspension of the same date, reciting that James Yarker, the [*472 elder, was unable to travel by reason of sickness and infirmity, was endorsed upon it. Another order, dated the 23d September, 1861, also endorsed upon it, after reciting the death of James Yarker, the elder, on the 18th August, 1860, and that the within order might be executed with respect to his widow and children, ordered the execution of that order; and after further reciting that it had been duly proved that charges to the amount of 14*l.* 14*s.* had been necessarily incurred by the township of South Otterington by the suspension of the order of removal, ordered the overseers of the township of Oversilton to pay the sum of 14*l.* 14*s.* to the overseers of the township of South Otterington. The widow and children were removed on the 25th September, 1861, and a copy of the order of the 23d September, together with a demand of the charges, was served on the overseers of the township of Oversilton. The account of the charges was as follows:—

Maintenance of James Yarker for half year ending 1860	£1	16	0
Coffin	0	18	0
Maintenance of wife and children after his decease . .	12	5	0
Total . .	£14	14	0"

Upon a complaint of non-payment, a summons under stat. 35 G. 3, c. 101, s. 2, was granted against one of the overseers of the township of Oversilton, which was heard at a petty sessions held on the 11th November, 1861; and, the above facts being admitted, a distress war-

rant was applied for against the overseers of Oversilton, but the justices refused to issue it without the direction of this Court.

**Knapp* showed cause.—The township of Oversilton is not chargeable with the item of 12*l.* 5*s.*, incurred by the non-removal of the widow during the twelve months after her husband's death under stat. 9 & 10 Vict. c. 66, s. 2; for stat. 11 & 12 Vict. c. 110, s. 3, throws all the costs incurred in the relief of a pauper rendered irremovable by reason of some provision in stat. 9 & 10 Vict. c. 66, on the common fund of the union to which the parish where he resides belongs. In *Re Williams*, 2 E. & B. 84 (E. C. L. R. vol. 75), where the parish to which the removal was ordered allowed the opportunity for appealing against the order for costs to pass by, Erle, J., said, p. 88, "I am not prepared to lay it down as an universal rule, that facts which are grounds of appeal against an order cannot be brought forward by way of defence when it is sought to enforce an order which has not been appealed against." Although there could be no appeal against this order under stat. 35 G. 3, c. 101, s. 2, seeing that the amount ordered to be paid did not exceed 20*l.*, the justices ought not to enforce it when it appears that there is an illegal charge. It would be idle for the overseers, against whom a summons had been taken out, to attend before justices and oppose the issuing of a distress warrant if the latter were bound to enforce the order.

West, contra, was not called upon.

COCKBURN, C. J.—I am of opinion that, consistently with the principle on which the Court acted in *Re Williams*, 2 E. & B. 84 (E. C. L. R. vol. 75), where there was an appeal against a similar order, this rule ought to be made absolute. According to that principle, which is **Knapp* equally applicable to a case where there is no appeal, the justices had no more to do than to see whether there was an order on which they could act, and, if so, to enforce it: they could not go into the merits. The Legislature, in stat. 35 G. 3, c. 101, s. 2, not having given an appeal against an order for costs when the sum ordered to be paid does not exceed 20*l.*, intended that the decision of the justices who made that order should be final and conclusive. The application for the order being ex parte, there does not appear to be any course open for contesting the liability of the township for the charge in question. Under this statute the single justice is merely to act ministerially; and therefore the duty of the present justices was plain, namely, to issue their distress warrant. If a justice, upon an application for a distress warrant under stat. 35 G. 3, c. 101, s. 2, could go into the facts and say whether the order was rightly made or not, there would be an appeal to him against the order, though the Legislature has not given an appeal to the Quarter Sessions.

CROMPTON, J.—I am of the same opinion, and will only add that it is not an idle ceremony to go before a justice on the complaint of non-payment, because the overseer may say, "I have paid the amount;" in which case the justice would not issue his warrant; but he has no power to do anything contrary to what the justices who made the order have previously done.

BLACKBURN J., concurred.

Rule discharged.

***THOMAS v. CHURTON. May 6.** [*475]

Slander.—Coroner.—Malice.—Want of reasonable and probable cause.

1. A coroner, holding an inquest on a dead body, is not liable to an action for words falsely and maliciously spoken by him in his address to the jury.

2. *Quare, per Cockburn, C. J., if they had been spoken by him maliciously, and without reasonable and probable cause?*

SLANDER. The declaration alleged that the defendant was coroner for the county of Chester, and was holding an inquest upon the body of a young child named Francis Timlin, then recently deceased, and who had been attended and surgically treated by the plaintiff shortly before his death; and the defendant, then being such coroner as aforesaid, and then addressing the jury who were then impanelled on the said inquest, falsely and maliciously spoke and published of the plaintiff, in a defamatory sense, the false, scandalous, and defamatory words following, that is to say: "There was an observation made at our last sitting by one of the jurymen in which I perfectly coincide, namely, that Mr. Evan Thomas (meaning the plaintiff) had certainly swindled the poor father out of a certain sum of money by pretending that the child's leg was fractured, and it seems also that the child underwent the mockery of a reduction of the fracture, for which the father was charged 10s." (meaning that the plaintiff had knowingly and falsely pretended to the father of the said child that the leg of the said child was then fractured when the said leg was not fractured, as the plaintiff, when he made such pretence well knew, and had, by means of such false pretence, wrongfully and unlawfully obtained from the *father of the said child, a sum of money, contrary to the form [*476] of the statute in such case made and provided, and that the plaintiff had cheated the said father of the said child, and been guilty of dishonest conduct, and of an offence punishable by law): by means of which slander the said jury were then greatly prejudiced and excited against the plaintiff, and were then led and induced wrongfully to find and return an inquisition against the plaintiff for the manslaughter of the said Francis Timlin, and the plaintiff was put to great costs and expenses in and about defending himself against the said charge, and suffered imprisonment, and was put to great trouble, annoyance, and inconvenience by reason of the premises. And the plaintiff claims 500*l.*

Demurrer.

*Milward, in support of the demurrer.—The words complained of were used by the defendant in the discharge of his official duty as coroner. Now the Coroner's Court is a Court of record, and consequently words spoken by the coroner in the discharge of his official duty are privileged as having been spoken by the Judge of such a Court. [COCKBURN, C. J.—If the Judge of a Court of record does this kind of mischief under the guise of duty, is he not liable?] Here is no allegation that the defendant knew that what he said was untrue, or that he said it without reasonable and probable cause. In *Hender-son v. Broomhead*, 4 H. & N. 569, it was held by the Exchequer Chamber that no action lies for false and malicious matter stated in an affidavit made in support of a cause in Court. [CROMPTON, J.—*

That case was much founded on *Revis v. Smith*, 18 C. B. 126 (E. C. L. R. vol. 86), where it was held *that no action lies against a witness for statements made by him in a judicial proceeding, even though made "falsely and maliciously, and without any reasonable and probable cause:" and proceeded on the principle that it is important there shall be no check upon the freedom of giving evidence in Courts of justice.] The older authorities are collected in 1 Wms. Saund. 181 b, note to *Lake v. King*, 6th ed., where it is said: "No false or scandalous matter contained in articles of the peace exhibited to justices of the peace; or in any other proceeding in a regular course of justice, will make it libellous." In *Garnett v. Ferrand*, 6 B. & C. 611 (E. C. L. R. vol. 13), it was held that no action lies against a coroner for turning a person out of a room where he is about to take an inquisition; and the coroner is there put on the same footing as the Judge of a Court of record. [COCKBURN, C.J.—It was not alleged there that the coroner did the act in abuse of his power.] *Rex v. Skinner*, Lofft 55, 56, was an indictment against a justice of the peace for scandalous words spoken by him in a general Sessions of the county; in which he said to the grand jury: "You have not done your duty; you have disobeyed my commands: you are a seditious, scandalous, corrupt, and perjured jury." The Court quashed the indictment, and Lord Mansfield, in delivering their judgment, said: "Neither party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office."

Manisty (Aspinall with him), in support of the declaration.—[COCKBURN, C.J.—What do you say to the want of an allegation of the absence of reasonable and probable *cause? Will you amend?] If the declaration is not good as it stands, that allegation would not help it; at all events, the circumstances of the plaintiff will not allow him to amend. [CROMPTON, J.—*Hodgson v. Scarlett*, 1 B. & Ald. 282, shows that no action will lie against a barrister for words spoken by him in the course of a cause, provided they are pertinent to the matter in issue.] That case was not decided on demurrer. [CROMPTON, J.—In 1 Rol. Abr. 87, *Action sur cause* (M). pl. 4, there is a case where the plaintiff, having made an affidavit in this Court to bind the defendant to his good behaviour, the defendant said of him "falsely and maliciously," in the hearing of the justices, "There is not a word true in that affidavit, and I will prove it by forty witnesses"; it was held that no action was maintainable, for the answer that the defendant made to the affidavit was a justification in law, and spoken solely in defence of himself, and in a legal and judicial way, inasmuch that he said that he would prove it by forty witnesses.] Here it is admitted on the record that the words were spoken "falsely and maliciously." Besides, a coroner is not a Judge of a Court of record. [CROMPTON, J.—The coroner's Court is a Court of record of very high authority; so much so, that the Lord Chief Justice of this Court is the supreme coroner of England. Suppose the Lord Chief Justice were to hold an inquest in any county of England, would he be liable to an action for using the words here stated?] No, because his rights of Lord Chief Justice would accompany him while holding the inquest. *Garnett v. Ferrand*, 6 B. & C. 611 (E. C. L. R. vol. 13), proceeded on a different ground. And the observations of Lord

Mansfield in *Rex v. Skinner*, Lofft 55, 56, which have been cited, are *explained by what follows, namely, "If the words spoken [*479] are opprobrious or irrelevant to the case, the Court will take notice of them as a contempt, and examine on information. If anything of *mala mens* is found on such inquiry, it will be punished suitably": besides which it did not appear in that case that the words spoken were false to the knowledge of the defendant, or that they were spoken with malicious intention. [CROMPTON, J.—It would give rise to great inconvenience if actions of this kind were to be brought. BLACKBURN, J.—In *Miller v. Hope*, 2 Shaw App. Cas. 125, it was held that an injurious censure cast by a Judge on a counsel practising before him, even though done injuriously and from private malice, is not actionable. That looks very much in point, except that it is a Scotch case. COCKBURN, C. J.—I am reluctant to decide, and will not do so until the question comes before me, that if a Judge abuses his judicial office, by using slanderous words maliciously and without reasonable and probable cause; he is not to be liable to an action.]

Per CURIA.

Judgment for the defendant.

*JOSEPH EDWARD HOLDSWORTH v. WILLIAM JAMES BARSHAM, Clerk to the Local Board of Health [*480] for the District of WEST HAM, in the County of ESSEX.

May 2.

Public Health Act, 1848, ss. 123, 127.—Appointment of umpire.—Award of costs.—Taxation.—Action.

Arbitrators under the Public Health Act, 1848, 11 & 12 Vict. c. 63, before they entered on the reference, but after the twenty-one days within which, by sect. 125, they ought to make their award, appointed an umpire. By sect. 127, the costs are in the discretion of the umpire, and the submission may be made a rule of Court. The umpire awarded the amount of compensation to be made to the plaintiff, and that the costs of the reference should be paid by the Local Board of Health. Held,

1. That the appointment of the umpire was not too late.
2. Per Cockburn, C. J., Blackburn and Mellor, J.J., Crompton, J., dissentient, that an action could not be brought for the costs until they had been taxed.

THIS was an action brought by the plaintiff to recover the sum of 180*l.* 14*s.* 7*d.*, being the amount of compensation awarded to him for damage done to his property at West Ham, in the county of Essex, by the Works of the Local Board of Health for the West Ham District. Also to recover a sum of 144*l.* 3*s.* 5*d.*, or any other sum to which the plaintiff might be held to be entitled, for his costs of and incidental to the reference.

The plaintiff also claimed a writ of mandamus for the purpose of enforcing his right to compensation and costs.

By consent, the following case was stated, and it was agreed that the pleadings should form part of it.

In or about the year 1856 the provisions of the Public Health Act, 1848, were adopted by the inhabitants of West Ham, and the parish of West Ham was constituted *a District for the purposes of [*481] that Act by a statute passed in the year 1856.

In the course of the years 1859 and 1860 the Local Board of Health

acting for the District constructed, under the powers of those Acts, extensive sewerage works, and in so doing damaged, as the plaintiff alleged, a house and other property belonging to him and situated within the District.

A claim was then made by the plaintiff upon the Local Board for that alleged damage; and, upon a question arising as to its amount, J. G. Hammack was, on the 10th August, 1860, appointed by the plaintiff in accordance with the provisions of The Public Health Act, 1848, as an arbitrator to decide the question of amount, and on the 14th August, 1860, J. G. B. Marshall, the salaried surveyor to the Local Board, was duly appointed by them as their arbitrator for the same purpose.

The arbitrators thus appointed had some correspondence with reference to the appointment of an umpire, but they did not extend the time for making their award, and nothing further was done by them under the reference until the 26th October, 1860, when Mr. Oliver, the attorney for the plaintiff, served upon each of them a notice pursuant of the Act, to appoint an umpire, within seven days from the service thereof, in the dispute between the Local Board and the plaintiff.

On the 27th October, a letter was sent by Mr. Oliver to the defendant, who then acted and has since continued to act as the clerk to the Local Board, enclosing a duplicate of the notice served on the arbitrators, adding that, if the umpire was not appointed within seven days, *the necessary steps consequent thereon would be resorted to [482] without further notice. On the 29th October the receipt of that letter was acknowledged by the defendant. A correspondence ensued between the arbitrators with a view to the appointment of an umpire, and they met on the 31st October, and appointed W. Tite to be their umpire according to the provisions of the Act.

On the 12th November the arbitrators met, when the defendant, in the presence of Mr. Oliver, objected before the arbitrators that their powers as such arbitrators had ceased, as they had not extended the time for making their award as directed by the statute. The arbitrators, upon hearing this objection, declined to proceed with the arbitration, the attorney for the plaintiff protesting against the objection.

W. Tite accepted the umpirage, and having extended the time for making his award, and having viewed the premises where the damage had occurred, appointed the 3d January, 1861, as the day on which he proposed to proceed with the reference, of which appointment both parties had due notice.

In accordance with this appointment W. Tite, having first duly made the declaration required by the statute, attended at his chambers on the 3d January, 1861, and, as J. G. B. Marshall did not attend nor any other person representing or on behalf of the Local Board, he proceeded with the reference ex parte: and having heard the evidence on behalf of the plaintiff, made his award on the 16th January, 1861, by which he awarded that the amount of compensation to be made to the plaintiff for the damage sustained was the sum of 180*l.* 14*s.* 7*d.*; *[483] and he also awarded that the costs of and consequent *upon the reference should be borne and paid by the Local Board.

On the 31st January a copy of this award was served upon the de-

fendant, and applications were subsequently made to the Local Board for payment of the amount awarded, as well as for the sum of 144*l.* 3*s.* 5*d.*, the amount claimed by Mr. Oliver for costs. Mr. Oliver's bill of costs for this amount was delivered to the defendant on the 6th February, 1861, before this action was commenced; and, amongst other items, it contained a charge of 20*l.*, which was demanded by and paid to the umpire as the costs of his award.

The plaintiff's costs of and consequent upon the reference had not in any way been ascertained or taxed, or fixed by the umpire, or any taxing officer or person having authority in that behalf, unless it be considered that by the demand of 20*l.* (which was not fixed by the award itself) the umpire fixed that sum as the costs of his award.

The fact of W. Tite's appointment was brought before the Local Board for the first time at the first meeting after November 12th, 1860, and the Board gave notice to the plaintiff and to W. Tite respectively, before he made his award, that they did not recognise the appointment of him as umpire.

The only ground upon which the Board refused to pay the amount awarded for compensation was that the appointment of the umpire was void, as the power of the arbitrators to make it had expired before the 31st October.

The questions for the opinion of the Court were, first, Whether, having regard to the statute, the *appointment of the umpire [*484] was too late; and, secondly, Whether the plaintiff was entitled to maintain this action to recover the costs, or any part thereof, the same not having been taxed or ascertained by the umpire or any proper officer before action brought.

If the Court should decide the first of these questions in the negative, judgment was to be entered for the plaintiff for 180*l.* 14*s.* 7*d.*, as the Court might direct, with costs of suit. But if the Court should decide that question in the affirmative, judgment was to be entered for the defendant, with costs.

If the Court should decide the last of these questions in the affirmative, the amount of costs to which the plaintiff was entitled was to be ascertained by the Master, and judgment entered for that amount. But if the Court should decide that question in the negative, judgment was to be entered for the defendant in such way as the Court should direct on the issues upon the fourth and eleventh pleas, which raised it.

Hawkins (with him *Garth*), for the plaintiff.—First, the appointment of the umpire was not too late. By The Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 125, the arbitrators are to make their award within twenty-one days; but it is competent for them to appoint an umpire after that time; for the appointment of an umpire is not a matter of reference. In The matter of Arbitration between Bradshaw and The East and West India Docks and Birmingham Junction Railway Company, 12 Q. B. 562 (E. C. L. R. vol. 64), it was decided, on The Lands Clauses *Consolidation Act, 1845, 8 & 9 Vict. c. 18, [*485] ss. 27 and 31, which, in substance, are similar to the provisions in sect. 125 of this Act, that the arbitrators, having failed to enter on the matters referred, and to make their award within the time limited, were not incapacitated from subsequently appointing an umpire.

[CROMPTON, J.—Is there no limit in point of time within which they must appoint an umpire?] In Russell on Awards, p. 223, 2d ed., it is said, “When the submission makes no special provision respecting the time when the arbitrators are to appoint the umpire, and a day is given to the umpire subsequent to that limited for the arbitrators making their award, they may appoint an umpire at any time before the making the umpirage has expired; for the power of appointing an umpire is quite collateral to that of making an award, and survives when the latter power is extinct;” citing *Adams v. Adams*, 2 Mod. 169; *Harding v. Watts*, 15 East 556, and other cases. [CROMPTON, J.—Under this statute no time is limited for the umpire making his award, except with reference to his appointment: by sect. 126 it must be within three months from the day of his appointment. COCKBURN, C. J.—It is in favour of the plaintiff that the statute could hardly have contemplated that all should be done by the arbitrators within twenty-one days.] In *Skerratt v. The North Staffordshire Railway Company*, 2 Phill. Ch. Rep. 475, it was held that, by sect. 23 of stat. 8 & 9 Vict. c. 18, the umpire had three months for making his award reckoned from the time of the duty devolving upon him, and that was noticed in Bradshaw’s Arbitration Case, 12 Q. B. 562 (E. C. L. R. vol. *486) 64). [BLACKBURN, J.—Putting **that construction* on sect. 23 of stat. 8 & 9 Vict. c. 18, the two cases are identical.] [He also cited *Evans v. The Lancashire and Yorkshire Railway Company*, 1 E. & B. 754 (E. C. L. R. vol. 72).]

Secondly. By sect. 127 of stat. 11 & 12 Vict. c. 63, the costs are in the discretion of the umpire, which is not like the provision in sect. 34 of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. It is not a condition precedent to the right to bring an action for costs that they should have been taxed. The award is good, on the ground that the amount of money to be paid will be made certain by taxation according to the maxim, *Certum est, quod certum reddi potest*. *Beale v. Beale*, Cro. Car. 383, cited in 1 Roll. Abr. *Arbitrement* (H) pl. 14, and *Linfield v. Ferne*, 3 Lev. 18, Russell on Awards, 2d ed. 288. The bill of costs was sent to the defendant within six weeks before action brought, and he might have taxed them, or have paid into Court a reasonable sum.

Prentice (with him *Bristowe*), for the defendant.—First, the power of arbitrators to appoint an umpire ceases after twenty-one days from their own appointment. If they could appoint an umpire after the time for making their award has expired, an award might be made by the umpire twenty years hence; because, by sect. 126 of stat. 11 & 12 Vict. c. 63, he has three months from the time of his own appointment. The decision in Bradshaw’s Arbitration Case, 12 Q. B. 562, 575 (E. C. L. R. vol. 64), was on the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, and this point did not occur. By sect. 23 of stat. 8 & 9 Vict. c. 18, the party claiming compensation may **go to a jury after three months have elapsed, but there is no such provision in this Act.* [CROMPTON, J.—There is a time limited.]

Secondly. The costs must be ascertained by the umpire or taxed by the Master before action brought. The submission could be made a rule of Court under sect. 127: *Bhear v. Harradine*, 7 Exch. 269;

and then they would be taxed by the Master. If they could not, the award would be bad for uncertainty: *Winter v. Garlick*, 1 Salk. 75. [CROMPTON, J.—Must the amount be made certain before action brought?] By bringing an action before the costs are ascertained or taxed, the jury will have to do what the umpire or the officer of the Court ought to have done, otherwise they can give no verdict. [CROMPTON, J.—Might we not delay our judgment in order that the costs may be taxed?]

Hawkins was not called upon to reply.

COCKBURN, C. J.—On the first and main question we feel ourselves bound by the decision in Bradshaw's Arbitration Case, and must leave the defendant to take this case to a Court of error, if he thinks the decision can be reversed.

As to the second objection, I am of opinion that at the time the plaintiff brought his action he was not in a condition to maintain it. The umpire simply determined that the plaintiff was entitled to costs, and left the amount to be ascertained in the ordinary way, viz., by taxation by the Master, after the submission *has been made a [*488 rule of Court, under sect. 127 of stat. 11 & 12 Vict. c. 68. I think that the plaintiff, who has not had the amount of costs to which he is entitled ascertained, cannot maintain an action for them. It is clear that an award can only be a cause of action when it awards a certain sum; and although, when an arbitrator awards costs without mentioning the amount, it is implied that the amount is to be ascertained by taxation, the costs in this case not having been taxed have not been ascertained, and therefore the action is premature: otherwise a party directed to pay costs would be liable to an action for a sum of money, the amount of which he had no means of knowing, and could not by possibility pay in order to get rid of the action. It is said that the costs may be ascertained pending the action; but we have to determine whether it was well brought. I am not aware of an action ever having been brought for costs until the amount had been ascertained by taxation or the verdict of a jury, and I think it better to adhere to the usual course.

CROMPTON, J.—On the first point, I think that there is no sound distinction between the present case and Bradshaw's Arbitration Case, 12 Q. B. 562 (E. C. L. R. vol. 64), and therefore we must act on the usual rule, to follow the decision of a Court of co-ordinate jurisdiction, without giving any opinion whether, if the matter were res integra, we should come to the same decision.

On the second point, I understand that my learned brothers are of the same opinion as the Lord Chief *Justice, but I am not prepared to agree with them. The question is, whether the amount [*489 of the costs not having been ascertained before action brought prevents the plaintiff from maintaining an action to recover them. It is clear that the award would be bad for uncertainty, the umpire not having fixed the amount of the costs, unless it is within the maxim, *Certum est, quod certum reddi potest*; as when an action is brought to recover a debt, and the sum is laid under a videlicet; or to recover the price of a commodity, and no price has been fixed. In my mind the award is good for the sum awarded as compensation and for the costs to be ascertained by taxation; and I do not see satisfactorily

how this differs from an action brought for an uncertain sum, in which the defendant can get a bill of particulars. The objection, that the defendant does not know how much to pay in order to stay the action, applies to every such action. If it were too late to tax the costs it would be a serious objection; but there is no limit as to the time within which the costs of an award may be taxed, and I do not see why they should not be taxed after action brought.

BLACKBURN, J.—On the first question I agree that there is not sufficient distinction between The Public Health Act, 1848, and The Lands Clauses Consolidation Act, 1845, to prevent the decision in Bradshaw's Arbitration Case, 12 Q. B. 562 (E. C. L. R. vol. 64), governing this; and therefore, without expressing an opinion to affirm or shake the authority of that case, I act upon the general rule and hold that we are bound by it.

*490] *The second question is, whether the plaintiff is entitled to maintain this action to recover the costs of the reference, they not having been ascertained by the umpire, or taxed before action brought. The costs being in the discretion of the umpire, he awarded costs to the plaintiff generally, and did not state the amount; and, if there was no proper officer having jurisdiction to tax the costs, the award would be bad for uncertainty. In Russell on Awards 287-8, 2d ed., it is said, "If a cause, either alone or with other matters, be referred, and the arbitrator in any terms direct one party to pay the whole or any proportion of the costs of the cause, as, for instance, if he order the defendant to pay all such moneys as the plaintiff has expended about a certain action, or that the plaintiff shall pay five-eighths and the defendant three-eighths of the costs, the award is sufficiently certain, though it does not ascertain the amount. This exception, or apparent exception, to the rule requiring certainty, is grounded on the practice of the superior Courts, in accordance with which the costs on such an award will be taxed as a matter of course by the officer of the Court, whose peculiar duty it is to settle their amount, and who, in so doing, is considered as acting rather in a ministerial than judicial capacity." It comes to this, that the amount is ascertained by the arbitrator because it is tacitly said that the officer of the Court shall do the work for him. And this is not peculiar to the matter of costs; it is a general principle that an arbitrator may reserve a ministerial act to be done by some other person; as, if he is to make a valuation of landed property, he may, after awarding the rate to be charged per acre, direct the number of acres to be

*491] *ascertained by measurement: Russell on Awards 281, 2d ed. But the party who was to pay the valuation could not be called upon to do so until the surveyor had measured; nor could a writ properly issue until the ministerial act had been done. It would be otherwise if it could be done by a jury; but in this case a jury can give neither more nor less than the amount ascertained by the umpire, and he acts through his ministerial substitute, the officer of the Court. This indeed is not an action upon a judgment in a superior Court; but a submission under an award may be made a rule of Court. In Russell on Awards 289, 2d ed., it is said, "Where the reference is by agreement, and contains a stipulation that it may be made a rule of one of the superior Courts, the amount of the costs of the reference

may be taxed by the officer of the Court; and therefore it is no objection that they are not settled by the arbitrator;" citing *Thorp v. Cole*, 2 Cr. M. & R. 367. 4 Dowl. P. C. 457, which was decided by Parke, B., who was a great authority on such matters. And it appears to me good sense, for I see no distinction between a reference by agreement, in which there is a clause for making the submission a rule of a Court, and a reference under an Act of Parliament in which there is such a clause.

On these grounds I think the action as to the costs is premature; and therefore I am obliged to answer the second question in the negative. But I see no objection to the submission being made a rule of Court now, and payment of the costs, when taxed, being enforced by a fresh action.

MELLOR, J.—I am of the same opinion. At first, on *looking at the statute and the clause which puts the costs in the discretion of the arbitrators, I thought that if they gave costs, the jury might settle the amount: but on looking at the context and considering the effect of the two clauses of sect. 127 together, by which a discretion is given to the arbitrators and the submission may be made a rule of Court, as well as the authorities, it appears that the amount of the costs must be ascertained either by the arbitrators or by the taxing officer. If the clause had said, as sect. 34 of The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, does, that the costs should be settled by the arbitrators; or that the arbitrators should ascertain them, as the order of reference in *Morgan v. Smith*, 9 M. & W. 427, did, the arbitrators would have been bound to determine the amount. But sect. 127 of stat. 11 & 12 Vict. c. 63, in general terms, puts the costs in the discretion of the arbitrators, and gives authority to make the submission a rule of Court. And as there is no limitation of time within which the costs are to be taxed, it is not now too late to make the submission a rule of Court and have them taxed. I do not see a middle course between the amount being ascertained before action brought and the amount being ascertained by a jury. But the latter alternative is not admissible; the amount must be ascertained by the taxing officer; and therefore I do not doubt that it must be done before action brought.

Judgment for the plaintiff for 180*l.* 14*s.* 7*d.*; for the defendant on the fourth and eleventh pleas.

*BEARD and Another v. PERRY. May 5. [*498]

County Court Act, 13 & 14 Vict. c. 61, s. 11.—Sum recovered.—Costs.

Where a plaintiff in an action in one of the superior Courts proves a debt exceeding 20*l.*, and the defendant proves a set-off, which reduces the verdict to a sum not exceeding 20*l.*, the plaintiff "recovers" the balance only within the meaning of the County Court Act, 13 & 14 Vict. c. 61, s. 11, and therefore is not entitled to costs.

THIS was an action of debt to recover the sum of 26*l.* 7*s.* for goods sold and delivered, to which the defendant pleaded never indebted and a set-off of 25*l.* 14*s.* for work and labour, on which pleas issues were joined. Upon the application of the plaintiffs a Judge's order

was obtained for the trial of the cause in the County Court, pursuant to stat. 19 & 20 Vict. c. 108, s. 26.

On the trial, in the County Court of Essex, holden at Braintree, the defendant proved a set-off to the amount of 14*l.*, and a verdict was entered against him for 12*l. 7s.*; but no certificate for costs was asked for by the plaintiffs, nor was any order made by the judge before whom the action was tried in respect of them, nor had any order been made by this Court or a Judge to entitle the plaintiffs to costs.

Upon the taxation the attorney for the defendant contended that the plaintiffs, having recovered less than 20*l.* in the action, and the Judge at the trial not having certified, were deprived of costs, under the County Court Act, 13 & 14 Vict. c. 61, s. 11, unless the Court or a Judge made an order for them. The master, however, held that, as the action was brought to recover more than 20*l.*, and the plaintiffs' claim was reduced by set-off to less than 20*l.*, the plaintiffs were entitled to their costs, and made his allocatur allowing the *plaintiffs their costs on the lower scale, on the authority of Tonge v. Chadwick, 5 E. & B. 950 (E. C. L. R. vol. 85). Subsequently the defendant obtained a summons calling on the plaintiffs to show cause why they should not be deprived of their costs, on the hearing of which Mellor, J., declined to make an order. In Hilary Term,

F. Russell obtained a rule for that purpose.

Philbrick showed cause.—Sect. 11 of the County Court Act, 13 & 14 Vict. c. 61, which enacts that if in any action in the superior Courts of debt or assumpsit, not being an action for breach of promise of marriage, "the plaintiff shall recover a sum not exceeding 20*l.*," the plaintiff shall have judgment to recover such sum only and no costs, does not operate when the plaintiff proves a debt exceeding 20*l.* but it is reduced to a sum not exceeding 20*l.* by payment or set-off. In Tonge v. Chadwick, 5 E. & B. 950 (E. C. L. R. vol. 85), this Court so decided; but also held that, as the plaintiff had recovered less than 20*l.*, his costs must be taxed on the lower scale under Reg. Gen. Hil. 16 Vict. "Directions to the Masters of the Courts" 8, 1 E. & B. Appendix, lxvi. In Ashcroft v. Foulkes, 18 C. B. 261 (E. C. L. R. vol. 86), however, the Court of Common Pleas decided that the amount recovered meant the final balance; and, after the decision had been given, on the case of Tonge v. Chadwick being referred to by counsel as having decided differently, Jervis, C. J., p. 271-2, said that the Court adhered to their decision as not inconsistent with the former, and intimated that this Court, when the question came properly before them, would decide in accordance with the view of that Court. In Cooch v. Maltby, 23 L. J. Q. B. 305, which was an action to recover a sum exceeding 20*l.*, where a verdict *was found for the defendant on a plea of tender as to 23*l. 5s. 8d.*, and the plaintiff had a verdict on the plea of never indebted for 3*l. 10s. 8d.*, Wightman, J., held that the amount of the tender was part of the sum recovered within the meaning of the directions to the masters of the Courts. The plaintiffs properly brought their action for the larger sum; they could not know whether the defendant would plead a set-off or not. [CROMPTON, J.—If this case had been tried at nisi prius, the entry on the record would be that the plaintiff was entitled to the

larger amount, and the finding on the other issue would be for the defendant; and judgment would be entered only for the balance. BLACKBURN, J.—Sect. 11 of stat. 13 & 14 Vict. c. 61, does not say that if the plaintiff had not a right to bring his action for a sum exceeding 20*l.*, he shall recover no costs: in the popular sense of the word, the plaintiffs have not recovered a sum exceeding 20*l.*] The section means that the plaintiff shall be entitled to costs in any action in which he sues for a sum exceeding 20*l.* [CROMPTON, J.—In Ashcroft *v.* Foulkes, 18 C. B. 261, 271 (E. C. L. R. vol. 86), Jervis, C. J., refers to Parke, B., as deciding, in Parker *v.* Serle, 6 Dowl. P. C. 384, that the balance is to be considered the sum recovered within the meaning of the directions to the taxing officers.

F. Russell, in support of the rule.—Tonge *v.* Chadwick, 5 E. & B. 950 (E. C. L. R. vol. 85), proceeded on a misapprehension that stat. 13 & 14 Vict. c. 61, s. 11, was the same in substance as stat. 9 & 10 Vict. c. 95, s. 129; consequently, the decision in that case is an authority in favour of the defendant, that where the debt is reduced by a set-off, the *balance only is the sum recovered. Stat. 19 & 20 [*496 Vict. c. 108, s. 24, enables a plaintiff to give credit for the amount of a set-off, and sue for the balance, if not above 50*l.*, in the County Court. (He was then stopped.)

COCKBURN, C. J.—It is impossible to get over the language of sect. 11 of stat. 13 & 14 Vict. c. 61. The question is, what is the meaning of the term "recover" in that section? The meaning is clearly indicated by the language of the legislature when it says, "if," in certain enumerated actions, "the plaintiff shall recover a sum not exceeding 20*l.* . . . the plaintiff shall have judgment to recover such sum only, and no costs." That means that in cases like the present the sum recovered is the balance; for although in one sense the plaintiff recovers his whole debt, because practically he gets that part which strikes off so much of the set-off as is owing to his adversary, yet he only actually receives the balance. It is, indeed, hard on the plaintiff that he must run the risk of losing his costs in such cases, for he may not know the amount of the set-off or whether the defendant will plead it; and I should be inclined to put a different construction on the section if I could do so, but the language is too strong.

CROMPTON, J.—According to the words in sect. 11 of stat. 13 & 14 Vict. c. 61, taken in their plain sense, the plaintiffs have not recovered a sum exceeding 20*l.* The case of Ashcroft *v.* Foulkes, 18 C. B. 261 (E. C. L. R. vol. 86), in the Common Pleas, is a direct authority on the point; and the decision of this Court in Tonge *v.* Chadwick, 5 E. & B. 950 (E. C. L. R. vol. 85), is really an authority, under the present County Court Act, for that decision of the Common Pleas. In Tonge *v.* Chadwick there was a motion *in the alternative that [*497 the plaintiff was not entitled to any costs at all, or that the costs should be taxed on the lower scale, and this Court refused the first under a misapprehension of the effect of the new County Court Act; and, according to my memory, the Court did so on the authority of Woodhams *v.* Newman, 7 C. B. 654 (E. C. L. R. vol. 62), without adverting to the fact that the decision in the latter case was upon the first County Court Act, 9 & 10 Vict. c. 95: since a claim reduced by set-off below 20*l.* was not within sect. 129 of that statute, for the sim-

ple reason that the county Court had no jurisdiction when the claim was above 20*l.* The other part of the decision in *Tonge v. Chadwick*, 5 E. & B. 950 (E. C. L. R. vol. 85), viz., that the plaintiff had recovered only the balance within the meaning of the eighth direction to the Masters of the Courts, Reg. Gen. Hil. 16 Vict. is an authority in favour of saying that the amount recovered here is 12*l.* 7*s.* only, and therefore the case is within sect. 11 of stat. 13 & 14 Vict. c. 61.

BLACKBURN, J.—I am of the same opinion, for the reasons stated. *Tonge v. Chadwick*, as to this point, proceeded on a mistake, and is inconsistent with *Ashcroft v. Foulkes*, 18 C. B. 261 (E. C. L. R. vol. 86). The latter case lays down the right rule; and, consequently, though the Master taxed correctly, according to the principle of the former case, that case having been overruled, this rule must be made absolute.

MELLOR, J. concurred.

Rule absolute.

The question raised and decided in the principal case, whether a set-off which reduces the plaintiff's claim below the limit required by statute to confer jurisdiction upon the Court in which suit is brought, operates to oust the jurisdiction, or not, has met with a different answer in this country. Thus in Pennsylvania, jurisdiction is conferred by Act of March 20th 1810, sect. 1, upon magistrates for demands which exceed in amount \$100. The plaintiff has, however, the election to sue for his claim in the Court of Common Pleas; but, in that event, he is by sect. 26 disallowed costs, unless he files an affidavit that he believes the demand exceeds \$100. By sect. 7 the defendant is compelled to plead before the justice a set-off of any demand under \$100. The provision contained in sect. 7 was novel, and it was designed to obviate a difficulty which had developed itself in practice. A claimant who knew of the existence of a counter-demand which would, if pleaded, reduce his demand under \$100, was embarrassed to know which tribunal to elect. Did he sue before a justice, the defendant withheld his set-off, and ousted the magistrate's jurisdiction. Did he, on the other hand, resort to the Court of Common

Pleas, the defendant pleaded his set-off, and deprived the plaintiff, who was unable to swear that the defendant owed him more than \$100, of costs. The remedial clause has not, however, removed the difficulty. If the set-off is unliquidated the plaintiff remains in the same uncertainty as to his forum: he cannot anticipate the amount which the defendant will claim, or a jury award in reduction, and until that sum is ascertained, he is unable to swear to the balance which results and is due him. Thus in *Sadler v. Slobaugh*, the plaintiff sued in the Court of Common Pleas for a debt of \$100 and interest, due on the sale of a horse, and the defendant pleaded the breach of a warranty of the horse, the plaintiff recovered \$85.31, and six cents costs. The Court held that as the warranty might be used as a defence to the consideration, or might be made the foundation of a separate action, and in either event the damages were contingent and uncertain, the plaintiff could not know whether his demand would fall below or exceed \$100, and could not intelligently elect the appropriate tribunal. As he could not be expected to make an affidavit that his demand exceeded \$100, when the knowledge of the elements which would be in-

cluded in the calculation was secreted in the breast of the defendant, and the estimate of their value depended upon the verdict of a jury, the requirement was dispensed with, and he was allowed to recover costs without filing an affidavit: 3 S. & R. 388. And where the set-off is liquidated the plaintiff may also find himself frustrated in his endeavours to recover his debt. The defendant may evade the clause by assigning his set-off to a third person, and thus oust the magistrate's jurisdiction. The plaintiff is not even permitted to give the defendant credit for a set-off, at least where it equals or exceeds \$100, in order to bring his demand within the cognisance of a magistrate; because this privilege might enable him to obtain a judgment before a justice, from which there would be no appeal on a demand exceeding the statutory limit: *Stroh v. Uhrich*, 1 W. & S. 57; *contra, Anderson v. Cook*, 26 Ind. (1866) 329. He is accordingly compelled to resort to a Court of Common Pleas, and as it is assumed that he cannot make the requisite affidavit, he would, by a literal interpretation of the statute, forfeit his costs. But as the object of the penalty was to induce him to go before a justice with his petty claim, and as he is unable to betake himself to that jurisdiction without putting his demand in jeopardy, the Courts have refrained from inflicting upon him the loss of his costs, and have dispensed with the necessity of the previous affidavit: *Grant v. Wallace*, 16 S. & R. 253; *Manning v. Eaton*, 7 Watts 346; *Odell v. Culbert*, 9 W. & S. 66; *Minich's Administrators v. Minich*, 9 Casey 378. This series of decisions establishes the general rule that where the demand is reduced below the statutory limit by a set-off, that reduction does not interfere with the plaintiff's recovery of costs. But there is no necessity for a dispensation of the 26th section, which requires of

the plaintiff an affidavit that his demand exceeds \$100. For a set-off, as its name imports, is not payment, but its opposite, a denial of payment. The plaintiff's claim is admitted, and it is sought to be avoided by a counter-claim of the defendant. Payment neutralizes and extinguishes the debt, but set-off balances another against it, and thus keeps the two opposed debts in equipoise. It requires the intervention of the law to make a set-off an adjustment and settlement of the demand. The plaintiff's oath, it thus appears, is limited to the amount of his own demand, which is not affected by the claims set off against it. This is true, however, only where the demands are distinct and independent—in other words, in the case of a strict set-off. In *Sadler v. Slobaugh*, *supra*, the damages for a breach of the warranty did not constitute a set-off, but a deduction from the price to be paid for the horse, and in that class of cases the reasoning of the Courts is correct, and the inconvenience caused by the 26th section does require their interposition. The effect of a set-off upon a plaintiff's demand becomes additionally important in consequence of the re-establishment of the privilege in its full extent. The Supreme Court hesitated at one period to apply the Statute of Defalcation: *McQuaide v. Stewart*, 12 Wright (Pa. 1864) 198; 107 E. C. L. 332, a; but their last decision reasserts the right to set off claims which spring from distinct and independent transactions, whether the counter-demand be liquidated or unliquidated: *Hunt v. Gilmore*, 26 Leg. Int. (Pa. 1869) 92. It follows from what has been said, that nothing but payment which reduces the claim to the required amount will bring the demand within the jurisdiction of a magistrate: *Collins v. Collins*, 1 Wright (Pa. 1860) 387; *Job v. Harlan*, 13 Critchfield (Ohio 1862) 485;

and, as consent cannot give jurisdiction, objection may be taken at any stage in the proceedings: *Collins v. Collins, supra*; though if the want of jurisdiction does not appear on the record, the facts will not be inquired into on error: *Funk v. Ely*, 2 Smith (Pa. 1866) 442. Reduction on appeal does not re-establish the jurisdiction: *Webb v. Tweedie*, 30 Mo. (1860) 488; *Murphy v. Campbell*, 36 Mo. 100, unless the appellate Court has also original jurisdiction: *Fowler v. Bishop*, 32 Conn. (1864) 199.

In the states which allow the defendant a certificate for the excess of his set-off over the plaintiff's claim, the amount of the set-off regulates the jurisdiction: *Ryan v. Bindley*, 1 Wall. (1863) 66.

- It is the legal cause of action which determines the jurisdiction, but the method of ascertaining the amount involved varies in the different classes of action. Thus in assumpsit for the breach of warranty on the sale of a horse, as the price furnishes the maximum amount of recovery, jurisdiction is ousted, unless the price exceeds or at least equals the statutory limit: *Kline v. Wood*, 9 S. & R. 294. In an action on a book account, the original entries supply the amount which constitutes the legal cause of action, and furnish the test of jurisdiction: *Scott v. McDonough*, 39 Vt. (1867) 203. In like manner, if the demand may, by any rule, be computed, and it does not exceed the requisite limit, though it assume the form of a bill in equity, it will be dismissed: *Sewall v. Chamberlain*, 5 How. 6. In New York, however, the limitation of jurisdiction to the Supreme Court does not, under the Constitution of 1846, extend to equitable cases: *Marsh v. Benson*, 7 Tiff. (1866) 358. In an action of debt on a bond, as the plaintiff can only recover the principal and interest, they

furnish the standard for the valuation of his claim. The interest is a legal measure of his damages, and constitutes a part of the demand: *Fowler v. Bishop*, 32 Conn. (1864) 199; *The Bank's Appeal*, 26 Leg. Int. (Pa. 1869) 117. And where judgment is confessed by warrant of attorney, it is not the penalty of the bond, but the sum due upon it, including interest, which establishes the jurisdiction: *Coates v. Cork*, 1 Miles 270. In debt on a replevin bond, it is the amount of rent due, which is the legal cause of action, and serves as the measurement of jurisdiction: *Freedenberg v. Meeler*, 7 Pa. L. J. 244; *Peyton v. Robertson*, 9 Wheaton 527. Where the custom prevails of giving the sheriff a receipt in a given sum for property attached, the security does not furnish the standard, but the value of the property taken must be resorted to for a gauge of the jurisdiction: *Fowler v. Bishop*, 32 Conn. (1864) 199.

In actions which are brought in order to try the title to property, as in detinue, ejectment, replevin, or even trover, it is the value of the property itself which determines the jurisdiction: *Peyton v. Robertson*, 9 Wheaton 527; *Taenzer v. Judge of Third District*, 15 La. An. (1860) 120; *Mississippi Railroad v. Ward*, 2 Black (U. S. 1862) 485.

Where the law furnishes no rule for the ascertainment of the sum in dispute, and prescribes no limitation of the amount to be recovered, as in actions for torts sounding in damages, the amount laid in the plaintiff's declaration must serve, in default of any more accurate standard, as the measure of jurisdiction: *Cooke v. Woodruff*, 5 Cranch 13; *Rodman v. Hutchinson*, 4 Wharton 242; *Strong v. Daniels*, 3 Mich. (1855) 466; *Inkster v. Carver*, 3 Jenn. (Mich. 1868) 484; *Solomon v. Reese*, 34 Cal. (1867) 28.

***MANSON, Appellant, HOPE, Respondent. May 7. [*498]**

50 G. 3, c. 41, ss. 6, 17.—*License.—Person going from town to town.—Hawkers Act.*

A person who resided in L., brought a quantity of drapery goods from thence to H, which he said were the remains of the stock of a Company, and there sold them without a license: Held, that he was subject to the duty imposed by stat. 50 G. 3, c. 41, s. 6, as "a trading person going from town to town," and therefore was liable to be convicted under sect. 17.

CASE stated for the opinion of this Court under stat. 20 & 21 Vict. c. 43, s. 2.

On the 29th January, 1861, at the Town Hall in Hastings, the appellant, Philip Manson, appeared before two justices of the peace for that borough, upon an information exhibited by the respondent, George Curling Hope, of Hastings, manager of The Trade Protection Society of that place; charging that he, the appellant, being a hawker, pedlar, petty chapman, and trading person, travelling from town to town, did trade, as such hawker, pedlar, or petty chapman, and did carry to sell and expose to sale divers goods, wares, and merchandise, to wit, drapery, without any license to him before then granted in that behalf authorizing him so to do; against the form of the statute in such case made and provided.

The respondent deposed that, on the 28th January then instant, a sale of drapery was advertised to take place at the Music Hall in Havelock Road, in the borough of Hastings (a large room let for concerts, balls, &c.), and a bill announcing the sale was handed to him about twelve o'clock that day. He went there and found a large quantity of drapery goods for sale. The appellant was there. The respondent purchased a table cloth. When he was in the sale room, he saw several other persons there buy goods, and a cashier taking money.

*The superintendent of police of Hastings deposed that he went to the Music Hall in the afternoon of the same day, and told the appellant that his object in calling on him was to know if he was a licensed hawker. The appellant replied that he was not; and in answer to the question, "Are you aware that to carry on a business of the kind you should have a hawker's license?" he relied, "No; these goods came direct from London: here they are, the remains of a stock of a gigantic concern of The Imperial Linen Company, and I am employed to sell them. I don't think I require a license to sell them. I don't go from town to town." Witness told him he was set in motion by The Trade Protection Society, and asked him if he had a license. He said "No;" and further added that he was stopping at The Havelock Hotel, Hastings, and that his town residence was Wigmore Street.

On these facts it was contended, on behalf of the appellant, that it had not been proved that he came under the description of a hawker and pedlar travelling from town to town, or from place to place; that he had got a superfluity of goods in the warehouses, which were of a respectable character, and, thinking he should get a market for them at Hastings, he hired the Music Hall, and the goods were sent direct to that place for sale, and nowhere else.

The justices convicted the appellant in the penalty of 10*l.*

The question for the opinion of this Court was whether the evidence was sufficient in law to sustain the conviction.

Barrow, for the respondent.—By stat. 50 G. 3, c. 41, s. 6, there shall be paid “by every hawker, pedlar, petty *chapman, and every [500] other trading person and persons going from town to town, or to other men’s houses, and travelling either on foot, or with horse, horses, or otherwise, in England, Wales, or the town of Berwick upon Tweed, carrying to sell, or exposing to sale, any goods, wares or merchandise, a duty of 4*l.* for each year;” and sect. 17 enacts that if any such person so travelling shall trade as aforesaid without the license required by sect. 9, he shall for each and every such offence forfeit the sum of ten pounds. The appellant, not being a householder in Hastings, and sending goods there for sale, was a person going from town to town, and carrying goods to sell within sect. 6. In *The Attorney-General v. Tongue*, 12 Price 51, the first count of the information, which charged the defendant, under sect. 7, as “being a trading person, going from town to town,” and not being a householder at S., and that place not being his usual place of abode, with selling goods by auction there without a license, was held to be supported by evidence that he left B., his place of residence and business, to go to S. in order to sell his goods, and there sold them. The *Attorney-General v. Woolhouse*, 12 Price 65, followed the decision in that case; and in *Dean, qui tam, v. King*, 4 B. & A. 517 (E. C. L. R. vol. 6), a person travelling from town to town, having packages of goods sent after him by a public stage wagon, and taking rooms at each town, and there selling the goods by auction, was held to be within sect. 7. [COCKBURN, C. J.—That was a stronger case than this, because the defendant went to two places and sold his goods there.]

Poland, for the appellant.—The appellant was not a trader, but a mere agent employed by persons in *London to sell these goods [501] [COCKBURN, C. J.—Does it make any difference whether the person travelling from town to town sells his own goods or the goods of another person? BLACKBURN, J.—There was strong evidence that these were the appellant’s own goods, if that is material.] An agent habitually going from town to town might be within stat. 50 G. 3, c. 41; but the appellant was employed for once only. He may have been staying at Hastings. [BLACKBURN, J.—There is evidence on which the justices might convict. COCKBURN, C. J.—I think the appellant must be taken to be a principal in the transaction, and that he was personally interested in the disposal of the goods. If the matter were res integra, I should not be satisfied that the appellant was rightly convicted: but the two cases in the Court of Exchequer settle the law. Here the business was carried on in London, and a person connected with that business brings goods from London to Hastings and sells them there: that is clearly within those cases.] Suppose a person were employed by the assignees of a bankrupt in London to sell goods at Liverpool. In *Rex v. Little*, 1 Burr. 609, a single act of selling was held not sufficient proof that the defendant was such a hawker as ought to take out a license. [He also cited *Rex v. Buckle*, 4 East 846.] If these goods had been all sold in one lot the case would not be within the Act. [COCKBURN, C. J.—That is not the

point submitted to us. CROMPTON, J.—I cannot see that a man may not be a hawker for one day within this Act.]

Per CURIAM. (COCKBURN, C. J., CROMPTON, BLACKBURN and MELLOR, JJ.) Conviction affirmed.

*VENNING v. BRAY. May 9.

[*502

Lease.—Rent.—Receiver.—Revocation of authority.

The defendant leased a farm to the plaintiff for fourteen years by deed, reserving rent payable quarterly. The deed contained various clauses by which the plaintiff and the defendant agreed respectively to do certain things, and concluded with the following clause: "And the said landlord further agrees and orders that R. K., or his appointed agent, is to receive all rents from the tenant at all times when it becomes due during the said term hereby granted, and his receipt to be a full and sufficient discharge from all liability thereof." Held that, R. K. having no interest in the rent, the agreement or authority for him to receive it was revocable.

REPLEVIN for seizing cattle. Ayowry for rent in arrear. Plea in bar, riens in arrear. Issue thereon.

On the trial, before Willes, J., at the Cornwall Spring Assizes, 1861, it appeared that the defendant was lessor and the plaintiff lessee of a farm under the following lease:

"This indenture, made the 3d January, 1860, between Reginald Bray, of, &c. (who, together with and including his heirs, executors, administrators and assigns, is hereinafter referred to and intended to be named by and under the denomination of 'Landlord'), of the one part, and Christopher Venning, of, &c. (who, together with and including his executors, administrators and assigns, is hereafter referred to and intended to be named by and under the denomination 'Tenants,' of the other part): Witnesseth that the said R. Bray, for himself, his heirs, executors, administrators and assigns, doth demise, lease and to farm let unto the said C. Venning, his heirs, executors, administrators and assigns, all that farm and lands, with the buildings thereon, called, &c., situate, &c., and containing, &c., excepting the house and garden occupied by the said R. Bray, and also excepting all mines, &c., reserving also all game, &c., and power *also to enter and view the state and condition of the said premises: To hold the same from the 25th March, 1859, for the term of fourteen years certain, at the yearly rent of 75*l*, payable quarterly, on the four usual quarter days, that is to say, &c., the first of such quarterly payments to be made on the first of the said quarter days happening after the commencement of the said term. And the said C. Venning, for himself, his executors, administrators and assigns, hereby agrees to pay to the said landlord the rent hereinbefore mentioned, free from all rates, tithe rent charge and taxes, or any other deduction whatsoever (except the landlord's property and income tax now or hereafter to be payable in respect of the said premises), and also to pay and discharge all taxes, including the land tax, all tithe rent charge, rates, burthens and outgoings whatsoever, and proportions of the same respectively, charged or chargeable on the said premises during the said term. And the said tenant further agrees, during his tenancy, to cultivate and manure the said lands in a husbandlike manner, &c. And the said tenant

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also agrees, during the last year of the tenancy, to allow the landlord or the incoming tenant full power to enter upon the said premises, and to proceed with the preparation for and cultivation of all crops whatsoever at the usual times for proceeding with the same, &c. And the said tenant further agrees not to underlet, transfer or otherwise part with the possession of the said premises, or any part thereof, without the previous license in writing of the said landlord, during his tenancy, without such consent. And the said landlord hereby agrees, during the said tenancy, to keep the dwelling-houses in repair (glass excepted), and to supply necessary gates, granite posts, rough timber for repairs, *&c. And the said tenant hereby agrees to keep [504] the boundary fences in repair, and build up all gaps when fallen down during the said term, and leave the same in repair at the end of the term, or sooner determination thereof. And the said landlord, R. Bray, further agrees and orders that Richard Kittow, Esq., of Tredawle House, of the parish of Alternon, or his appointed agent, is to receive all rents from the tenant, C. Venning, at all times when it becomes due during the said term hereby granted, and his receipt to be a full and sufficient discharge from all liability thereof. In witness," &c.

The first quarter's rent had been paid to Kittow in pursuance of the clause at the end of the lease; but in May, 1860, the defendant gave notice to the plaintiff not to pay any more rent to Kittow. Notwithstanding, the plaintiff paid the subsequent quarter's rent to him, and refused to pay it to the defendant; and the defendant thereupon made the distress for it out of which this action arose. The jury found that there was no debt due to Kittow, and that the authority to him to receive the rents was not coupled with any interest in him. The learned Judge thereupon directed the verdict to be entered for the defendant, reserving leave to move to enter the verdict for the plaintiff on the issue joined on the plea in bar upon the question whether the authority contained in the clause at the end of the lease was revocable or not.

In Easter Term,

J. B. Karslake obtained a rule accordingly, on the ground that the clause in the lease created a contract, and was not a mere license; and, if it was a license, it was not duly revoked; citing *Wood v. Manley*, 11 A. & E. 34.

**H. T. Cole* showed cause.—By the reddendum in the lease [505] the rent is reserved to the defendant, and the plaintiff agrees to pay it to him. Then the clause in question appoints Kittow, the agent of the defendant, to receive it; and such an authority, though under seal, is revocable: *Wood v. Leadbitter*, 13 M. & W. 838, 845, per Alderson, B., in delivering the judgment of the Court; though the point did not distinctly arise in that case. So a power of attorney, not given to a party to collect rents, and to pay himself out of them a debt owing to him, is revocable. In *Wood v. Manley*, 11 A. & E. 34, the license was coupled with an interest in the licensee. Kittow is not a party to the deed. He might go abroad, or become bankrupt. Suppose he died, could it be contended that the rent would be receivable by his executors or administrators? (He was then stopped.)

J. B. Karslake and Kingdon, contra.—First. The clause in question

is part of the contract between the lessor and lessee, and is binding on the lessor. The word "agrees" is used in the other clauses of the lease as to payment of rent, &c., instead of the word "covenant," and its being used in this clause also shows that it was matter of contract between the parties that the rent should be paid to Kittow. [CROMPTON, J.—Then you must go the length of saying that, if Kittow for some reason was not ready to receive the rent, the lessor would be liable to an action by the lessee for breach of the agreement.] If Kittow was the superior landlord, it might be very convenient that the parties should agree that the rent should be paid to him. [*506] [COCKBURN, C. J.—If the clause had been *inserted on that account, we should expect to find a recital to that effect.] In *Wood v. Manley*, 11 A. & E. 34, 37 (E. C. L. R. vol. 39), Patteson, J., said: "Taylor v. Waters, 7 Taunt. 374 (E. C. L. R. vol. 1), shows that a license to use a seat at the opera house, paid for and acted upon by sitting there, cannot be countenanced. . . . I do not say that a mere purchase will give a license: but here the license is part of the very contract." The agreement is personal, and therefore if Kittow died the rent would not be receivable by his executors.

Secondly, the authority is not revocable, except by an instrument under seal. [CROMPTON, J.—That point was not reserved.]

COCKBURN, C. J.—We are to collect what the intention of the parties was, as far as we can, from the language of the deed. There is no doubt that an authority with an interest is irrevocable, whereas an authority without an interest is revocable; but that point does not arise in this case. The question is whether, in this deed, which is an ordinary deed of lease, this somewhat singular clause, that the rent reserved by the reddendum shall be received by Kittow, is binding on the lessor so as not to be revocable. If there was anything in the deed to show that this clause was inserted for the protection of the tenant, it may be that it could not be revoked by one party without the consent of the other. But it is a mere authority to the tenant to pay the rent to Kittow, and an authority to Kittow to receive it, not as a party interested, but as agent for the landlord, and for the convenience of the landlord; and consequently it is revocable. After notice no longer to pay the rent to Kittow, it was paid *by the plaintiff in his own wrong; and this rule must therefore be [*507] discharged.

CROMPTON, J.—It is not very material whether this clause is an agreement or an authority, because as long as it subsisted it would protect the tenant in paying the rent to Kittow; and in that sense it is an agreement. But the question is, whether it is an agreement that the authority of Kittow to receive the rent should be irrevocable as between the parties. Reading this clause together with the reddendum, I construe it as an order or agreement that Kittow should be, during the term, the lessor's agent to receive the rent subject to the usual power of the principal to revoke the authority of the agent. The words "during the term" do not import that the appointment is irrevocable. The clause amounts to no more than appointing Kittow to receive the rent so long as he is the defendant's agent. If the object of it had been to secure an advantage to Kittow, it would not be re-

vocable; besides which it was not inserted for the convenience of the plaintiff, but of the defendant.

BLACKBURN, J.—The parties might have agreed that the appointment of Kittow should be irrevocable. But to construe this clause as having that effect would be inconsistent with the reddendum and the rest of the lease; and therefore, according to the rule that a deed is to be construed so as to reconcile all the parts of it, this is an authority to pay the rent to Kittow so long as a receipt by Kittow is good as a discharge. There are no words to show that the tenant stipulated that the appointment should be irrevocable; and none of [508] the exceptions to the rule, that an authority is revocable, arise here. *This is the common case of agency, which may be revoked.

MELLOR, J.—There is nothing in the deed to prevent the revocation from operating; for, even if this clause is construed as an agreement, the revocation would only be a breach of agreement. Therefore the learned Judge at the trial was right. Rule discharged.

WORTHINGTON and Another v. SUDLOW, Clerk to the Local Board of Health for the District of MOSS SIDE. April 29.

Public Health Act, 1848 (11 & 12 Vict. c. 63).—Notice to owners.—Contract.

A Local Board of Health for a non-corporate district, acting under The Public Health Act, 1848 (11 & 12 Vict. c. 63), gave notice to the owners of the premises fronting, adjoining, or abutting on certain streets, requiring them to "sewer, level, pave, flag, and channel" the same, according to the provisions of sect. 69 of that Act; which notices not being complied with within the specified time, the Board entered into contracts with a third person for the performance thereof; which contained provisions that the contractor was to be paid for the work when the money was collected from the owners of the adjacent properties: the work was done accordingly, but the owners having refused payment, the justices of the peace before whom they were summoned for non-payment dismissed the summonses: Held, on a case in which the Court was empowered to draw inferences of fact, that the contractor was entitled to sue the Board of Health for the work done by him under the contracts.

SPECIAL case.

An action was brought by the plaintiffs against the defendant, as the clerk for the time being of the Local Board of Health for the district of Moss Side, adjoining the city of Manchester, for the [509] recovery of *3310*l.* 15*s.* 8*d.*, the balance of four several sums of 2367*l.*, 2876*l.* 10*s.*, 1228*l.*, and 1122*l.*, being the price of certain works specified in four contracts, the first of which was dated the 10th February, 1858, the second the 7th July, 1858, and the third and fourth the 17th November, 1858. The pleadings were set out in the appendix to the case, and were to be taken as part of it, the Court having all the powers of amending or adding to the pleadings that a Judge at nisi prius would have had; the object of both parties being to have the matters really in dispute between them finally decided.

All these contracts were entered into between the plaintiffs and the Local Board of Health for the district of Moss Side, being a non-corporate district, for which a Local Board of Health had been duly constituted according to the provisions of The Public Health Act, 1848;

and they were signed by the plaintiffs as the contractors, and were sealed with the common seal of the Local Board, and were signed by five of the members of the Board, and otherwise executed in conformity with the provisions of the 85th section of that Act. The works specified in each contract were the sewerage, levelling, paving, flagging and channelling of certain streets within the district, not being highways, which were sewered, levelled, paved, flagged or channelled to the satisfaction of the Local Board, and the works were such as the Local Board might execute under the 69th section of the Act, upon the failure so to do of the owners or occupiers of the adjoining premises. Each contract contained a stipulation binding the plaintiffs to perform the works, the subject of the contract, within the time and in manner therein specified, under a pecuniary penalty; and [*510] also a provision stating that the contractors were to be paid for the work when the money was collected from the owners of the adjacent properties. All the contracts were set out verbatim in the appendix to the case, and were to be taken as part of it.

The works, the subject of each of the four contracts, were duly performed by the plaintiffs, as the contractors, within the time and in manner therein mentioned.

Before entering into any of the contracts with the plaintiffs, the Local Board had given to the several owners of the respective premises fronting upon the streets therein mentioned a notice in writing, intended as a notice such as is required in that behalf by the 69th section of the Act. The form of notice adopted by the Board in every case was as follows:—

“Public Health Act, 1848.

“To Thomas Willis, owner of a dwelling-house and garden situate at Moss Grove, Moss Lane, within the district of the Moss Side Local Board of Health.

“Whereas the street called Moss Lane or Moss Lane West is not sewered, levelled, paved, flagged and channelled to the satisfaction of the above named Local Board of Health; the said Local Board of Health do hereby give you notice, as owner of a dwelling-house and garden situate at Moss Grove, Moss Lane, being premises fronting, adjoining or abutting on a part of the said street called Moss Lane or Moss Lane West, within the space of one calendar month from the day of the date hereof, to sewer, level, pave, flag and channel, to the satisfaction of the said Local Board of Health, so much of the said street as the said premises front, adjoin to, or abut upon.

“If you fail to comply with this within such time, the *said Local Board may, if they shall think fit, execute the said sewer-[*511] ing, levelling, paving, flagging and channelling; and the expenses incurred by them in so doing must be paid by you, together with the other owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor of the Local Board of Health, or in case of dispute, as shall be settled by arbitration, having regard to all the circumstances of the case, in the manner provided by ‘The Public Health Act, 1848;’ and your proportion of such expenses may be recovered from you, as one of such owners, in a summary manner, or the same may be declared by order of the said Local Board, to be private improvement expenses,

and be recovered as such in the manner provided by the said 'Public Health Act.'

"Dated the 5th day of May, 1858.

"JNO. THOS. PRICE,
"JNO. C. HARRISON,
"GEO. LEA,
'WM. METCALF,
"JAMES HOMISFIELD.
} (L. S.)

'J. H. HAMPSON, clerk to the Moss Side Local Board of Health,
12 Norfolk Street, Manchester."

All the owners failed to comply with the notices, and the Local Board thereupon entered into the contracts for the purpose of executing the works under the 69th section of the Act.

After the works under each of the four contracts had been performed by the plaintiffs, application was made by the Local Board in due form to each of the owners for payment of his or her just proportion of the expenses incurred in executing the works, which had been settled *by the surveyor of the Local Board as payable by each [512] such owner, according to the frontage of his or her premises upon the streets mentioned in each of the contracts, and all the sums received by the Local Board in consequence of such applications before the commencement of this action were duly paid by them to the plaintiffs.

Certain of the owners, on being so applied to, refused payment, and in several cases the justices before whom the owners were summoned by the Board for the purpose of enforcing payment, held the notices bad, and refused to make any order, considering themselves bound by a decision of the Court of Quarter Sessions which had then recently, and after the date of the contracts, been given in an analogous case, upon the authority of a case, in the Court of Queen's Bench, of Parkinson, appellant, Mayor, &c. of Blackburn, respondents.(a)

In consequence of this, the Local Board thought it useless to take further proceedings, and in point of fact no further proceedings were taken by the Local Board to enforce payment from the rest of the owners of the respective sums assessed upon them in respect of their premises, and since the time for payment of those sums more than six calendar months elapsed before the action was commenced.

The question for the Court was whether, under the circumstances, the Court having the power to draw inferences of fact, the plaintiffs had any remedy by action against the Local Board to recover the residue of the several sums, the subject of the four several contracts above mentioned, or any of them.

If the Court should be of opinion in the affirmative, judgment was to be entered for the plaintiffs for the sum of 3810*l.* 15*s.* 8*d.*, with costs.

*If in the negative, judgment was to be entered for the defendant, with costs.

If the Court should be of opinion that the plaintiffs were entitled to recover in respect of some one or more, but not in respect of all of the contracts, judgment was to be entered for the plaintiffs for such a sum as the Master should find to be due to the plaintiffs in respect of

that contract, or those contracts, upon which the opinion of the Court was in favour of the plaintiffs, after allowing and giving credit to the Local Board for all payments made on account of that contract, or those contracts; and for the defendant in respect of the other contract or contracts: the costs in such case to be ascertained and determined according to the usual course of taxation in such cases.

Manisty (Mellish with him), for the plaintiffs.—The plaintiffs are entitled to recover. The question depends on the 69th section of the 11 & 12 Vict. c. 63, entitled "An Act for promoting the public health;" which enacts, "In case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the Local Board of Health, such Board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said Local Board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the *owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said Local Board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided." It was a condition precedent to this contract that the Board of Health, which the defendant represents, should be able to recoup themselves for this money from the owners of property abutting on these streets. But, where the performance of a condition precedent to suing on a contract has been rendered impossible by the act of the opposite party, an action may be maintained without performing that condition; *Keys v. Harwood*, 2 C. B. 905 (E. C. L. R. vol. 52); *Hall v. Conder*, 2 C. B. N. S. 22 (E. C. L. R. vol. 89); *Bain v. Kirk*, 18 L. J. Q. B. 83, 13 Jur. 559; and the same principle ought to apply here, where the Board of Health have failed to exercise the power vested in them by the statute of compelling payment from certain persons, or, in failure of that, reimbursing themselves out of the rates which by the Act they are empowered to make.

Wheeler, Serjt. (T. Jones, Northern Circuit, with him).—It may be conceded that the intended basis of the contract between the parties was that the expense of sewerage, &c., these streets should be recovered by the Board of Health, which the defendant represents, against the owners of the property abutting on them. Now the foundation of all legitimate *proceedings against those persons is the giving valid notices, which was not done, as those given were held bad by the justices under the authority of a case in this Court, *Parkinson, app., Mayor &c. of Blackburn, resp.*, 38 L. T. 119. But where the parties to a contract omit inserting in it a matter which they deem material to their interests, a Court of law cannot insert it

the owners, or had given an insufficient notice, which is no notice at all. My brother Wheeler says, the other party should have inquired into the means possessed by the Board of recouping themselves. I do not see that. It is the case of a man representing that he is invested with powers with which he is not invested; and I agree with those cases where it has been decided that the assumed authority under which an agent acts, must, as against him, be taken to exist.^(a) I cannot help thinking that it would be a grievous injustice, as well as not carrying out the law as now understood, if it were to be a defence to such an action as this that the Board had failed to give the notices necessary to enable them to collect the fund. On the contrary, I think that an action may be maintained by the plaintiffs against the Board, which represented to them that they had power to collect, from the owners of the property in this street, the fund out of which the plaintiffs were to be paid, when in fact the Board had not done what was necessary for that purpose.

CROMPTON, J.—I am of the same opinion. The most favourable way to put the case for the defendant is that in which it was put by my brother Wheeler,—that the defendants had agreed with the plaintiffs that they should take their chance of the money being collected from the owners. If it were necessary I should like to look more into this point, and see if to make that a condition precedent to payment was within the *intention of the parties, much more if it was necessary that the money should be first collected. But, taking my brother Wheeler to be correct in that construction, I think, with my Lord Chief Justice, that it is more likely that an agreement ought to be implied here, that when the time for collection came the Board should collect. The contract is, not that the plaintiffs shall have power to collect themselves, but that the Board shall pay these specific sums of money. Does not that necessarily infer that they are assuming to be in a position in which they can collect the money? There may indeed be some doubt as to the extent of the supposed implied engagement. It may mean that they have used, and will use, all proper means to collect the money, or it may mean that they are in a position to collect it ultimately: we cannot put it lower than that. If, by their default (I do not mean in the sense of imputing to them anything wrong), they make an engagement with an implied promise that they are in a position to do that which they are not in a position to do, the case becomes like that where a party promises to pay the value found by an arbitrator, and does not appoint an arbitrator, in which case the other party may recover.

BLACKBURN, J.—I am of the same opinion. My brother Wheeler argues that this contract was invalid as ultra vires, because, the Board being about to do work for these private streets, the amount of which was chargeable upon the owners under the 69th section of the 11 & 12 Vict. c. 63, it was requisite, as a condition precedent to the validity of this contract with the plaintiffs, that notice be given to these owners; and he put it that, *inasmuch as a sufficient notice was not given, the Board had no power to do the work. I do not inquire if notice was a condition precedent here, for, when a party contracts with a Board under sect. 85, he is not bound to inquire if

(a) See Collen v. Wright, in error, 8 E. & B. 647 (E. C. L. R. vol. 92).

they have done enough, as between them and their constituents, to make themselves chargeable. It would be monstrous to throw the burden of such an inquiry on the plaintiffs: it is enough for them to say, we know that by the general law the Board could make this contract if they had done their part, and therefore the contract is good enough so far as we are concerned.

Then comes the question, whether on the construction of this contract the plaintiffs can recover. I am not prepared to say that the parties have not made the collection of this money a condition precedent. It would be a provident condition. And I am inclined to think it would be good enough for the Board of Health to say to the contractor, "Look at the value of the property, and if we find that the money received is not equal to what was expected, there shall be no coming on us afterwards." But although I am not prepared to say on this contract that the Board have not made the collecting the money a condition precedent to pay, I hold strongly (with the Judges who have preceded me) that it amounts to an agreement by the Board to do their part towards collecting the money. It is not, however, necessary to go so far as to say that the money must be collected; for instance, the owners may be insolvent, or the property may be destroyed by fire; in such cases, the Board of Health having no control over the money, I am not prepared to say whether the loss would fall on the contractor. But where the words of an instrument show that its efficiency is to depend on an act to be done by one party, there *is a contract by that party that he will do all that lies [*522 in his power to bring about that act, and that if it is not already done it shall be done. In mercantile contracts, whether under seal or not, the rule is to look to the intention of the parties. Where, for instance, there is a contract to deliver goods free on board ship on the mate's receipt, it is plain that, although not a word is said to that effect, the goods cannot be put on board until the other side has selected and mentioned a ship, and there is therefore an implied contract that that party shall secure a ship and give notice that the goods may be put on board. So, in the very common case where a party makes a contract with a railway Company to supply them with railway chairs and sleepers, although it is not expressly said that the purchaser is to produce the patterns, it is taken as part of the agreement between the parties that he shall do his part. So here, where from the nature of the thing everybody must have understood that the collection of the money depended on the Board of Health taking proper steps, it is part of the agreement that they shall do their part, or have already done it; and consequently, where they have given a notice which turns out to be bad, they have not done that which they undertook to do.

MELLOR, J., concurred.

Judgment for the plaintiffs. |

*523] *BIGGS, Appellant, MITCHELL, Respondent. April 26.

12 G. 3, c. 61, s. 11.—*Keeping gunpowder.—Carrier.—Warehouse.*

Where several packages of gunpowder, amounting in the whole to 300 lbs. weight, were sent by different persons to a warehouse in the metropolis belonging to a carrier and licensed carman, as a temporary halting place in their transit, until they should afterwards be forwarded by country carriers to their several destinations: held, that this was not an unlawful having or keeping of gunpowder within 12 G. 3, c. 61, s. 11.

CASE stated by the Lord Mayor of London for the opinion of this Court, under 20 & 21 Vict. c. 43.

The appellant was, on the 22d March, 1861, convicted before the Lord Mayor of London, on the information of the respondent, (one of the inspectors of the city of London Police force), under 12 G. 3, c. 61, s. 11, for that he, on the 15th day of March then instant, in one Swan Yard, Bishopsgate Street Without, in that city, unlawfully did have and keep at one time more than fifty pounds weight of gunpowder, to wit, three hundred pounds weight of gunpowder, in a certain warehouse there occupied by him, he not then being a dealer in gunpowder, and was adjudged to pay a penalty of 10/- and costs.

Upon the hearing of the information it was proved, on the part of the respondent, that on the day named, about two o'clock in the afternoon, he, with another inspector of the city police, seized, under a search warrant granted by the Lord Mayor, six packages of gunpowder, weighing together 300 lbs. weight, which they then found on the premises of the appellant, who was a carrier and licensed carman, in a sort of warehouse where goods of every description were then kept,

*524] for the purpose of *being afterwards removed by country carriers to their several destinations. These packages of gunpowder, which were not covered over with tarpaulins, had been sent a few hours before, from different persons, to be forwarded by carriers to different places. The appellant was aware of the nature of the contents of these packages, and it was proved to the satisfaction of the Lord Mayor that they were placed in the warehouse as a temporary halting place in the course of their transit, and that they would have been sent away from the appellant's premises in about two hours from the time they were so found by the inspector of police, and that the appellant had entered them in the book which he, as a carrier, kept of the goods received and sent out.

It was contended, on the part of the appellant, that the Act of Parliament was intended by the Legislature to apply only to persons "having" or "keeping" in their possession a quantity of gunpowder beyond what was prescribed and allowed, not to gunpowder in transitu, which that in question was; that the appellant merely kept a dépôt for goods in transitu, as was proved to the satisfaction of the Lord Mayor; and that, if he was to be held to have committed an infraction of the law by having there for a short interval of time a quantity of gunpowder, with other goods, on their way to different destinations, there was not a railway Company in the kingdom which did not contravene the statute at one or other of its stations almost daily; that the words "have" or "keep" at any one time, in the 12 G. 3, c. 61, s. 11, contemplated a man "keeping, for an indefinite

period, a prohibited quantity of gunpowder," and could not apply to the appellant, who had the packages in question in his warehouse, not for any unreasonable time, but only for an *interval consistent [^{*525} with the exigencies of the trade, and necessary for their several conveyance to their final destination.

The Lord Mayor, however, being of opinion that the Legislature intended, by the Act of 12 G. 3, c. 61, particularly when considered in connection with the 18th and 21st sections, which impose penalties on persons engaged in the conveyance of gunpowder who shall not properly cover packages of gunpowder whilst being conveyed, or who shall not use all due diligence in the loading or unloading of it, that gunpowder should only be removed in carriages constructed or used expressly for the purpose, and with no other commodities, or promiscuously as the packages in question were then sent and deposited, and that therefore the appellant had brought himself within the operation of sect. 11 of the 12 G. 3, c. 61, and he thereupon gave his determination against the appellant in the manner before stated.

The question on the above statement for the opinion of this Court was, whether the appellant did "have or keep" at one time the said excessive quantity of gunpowder within the intent and meaning of the 12 G. 3, c. 61. If the Court should be of opinion that he did not so "have or keep" the same, then the information was to be dismissed; but if the Court should be of opinion otherwise, the conviction was to stand.

The question in this case turned on the 12 G. 3, c. 61, entitled "An Act to regulate the making, keeping, and carriage of gunpowder," &c.

The preamble of the statute is as follows.

"Whereas the manufacture of gunpowder within Great Britain, though necessary to be encouraged in *respect of the value of gunpowder, as an article of defence and commerce, yet ought to be regulated by law, in order to prevent the great mischiefs which may arise from explosions occasioned by the improper construction and use of the mills, engines, and buildings, employed in the making of gunpowder, and for keeping and carrying gunpowder in too great quantities, or in an improper manner:" (it then recites that a previous Act contained no provision for regulating the making of gunpowder, and was in other respects defective, on which account it might be convenient to repeal the said Act, and, in the room thereof, to have a new law for regulating, as well the making as the keeping and carriage of gunpowder.)

Sect. 11. "No person or persons shall have or keep, at any one time, being a dealer or dealers in gunpowder, more than 200 lbs. of gunpowder; and not being such, more than 50 lbs. of gunpowder, in any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf, or other building or place, occupied by the same person or persons, (all buildings and places adjoining to each other, and occupied together, being to be deemed one house or place within this Act), or on any river or other water, (except in carriages loading or unloading or passing on the land, or in ships, boats, or vessels, loading or unloading, or passing on any river, or other water, or detained thereby by the tide or bad weather), within the following limits; (that is to

say), within the cities of London or Westminster, or within three miles of either of them, or within any city, borough, or market town of Great Britain, or one mile of the same, or within two miles of any *527] palace or house of residence of his present Majesty, &c., or of her present Majesty the *Queen, or any Queen Consort, or dowager, or within two miles of any gunpowder magazine, belonging to his Majesty, &c., or within half of a mile of any parish church, or in any other part of Great Britain, (except in mills or other places which at the commencement of this Act shall be used for the making of gunpowder, and the magazines, storehouses, and offices thereto adjoining and belonging, and in the places where it shall be lawful to make gunpowder, or to keep greater or unlimited quantities of gunpowder, by force of the provisions hereinafter contained), on pain of forfeiting all the gunpowder beyond the quantity hereby allowed to be kept, and the barrels in which such gunpowder shall be; and also two shillings for every pound of gunpowder beyond such allowed quantity."

Sect. 18. "No person or persons shall have or convey at any one time within Great Britain more than twenty-five barrels of gunpowder in any wagon, cart, or other carriage by land, or more than 200 barrels of gunpowder, in any barge, boat, or other vessel by water (except, &c.), and all gunpowder conveyed on land or water (excepting, &c.), shall be in barrels close joined and hooped, without any iron about them, and so secured that no part of the gunpowder be scattered in the passage; and each barrel shall contain no more than 100 lbs. of gunpowder; and when conveyed by land shall be entirely enclosed in a leathern bag, or a bag commonly called a saltpetre bag; and every carriage in which gunpowder shall be conveyed by land, shall have a complete covering of wood, painted cloth, tarpaulin, or wadmill tilts, over all the gunpowder therein contained: and also no gunpowder shall be conveyed in any barge, boat, or other vessel by water (except, &c.), that hath not a close deck; and as *soon as any *528] gunpowder is put on board such vessel, all such gunpowder shall be covered with raw hides or tarpaulins; and all gunpowder, which shall be carried, or conveyed (except, &c.), within any part of Great Britain, in greater quantity, or in other manner than is herein-before prescribed; and the barrels in which such gunpowder shall be, may be seized," &c.

Sect. 21. "No person or persons having the care of any wagon, cart, or other carriage, used for the conveyance of gunpowder by land, shall, after beginning to place or load therein any quantity of gunpowder, or beginning to unload the same thereout, stop or stay at any place of loading, or in the loading or unloading, suffer any longer time to pass than with the use of all due diligence shall be reasonably necessary for the purpose of loading or unloading; and no person or persons having the charge or care of any barge, boat, or other vessel used for the conveyance of gunpowder by water (except, &c.), shall, after beginning to load or unload any quantity of gunpowder, stop or stay at any wharf, key, or other place of loading, or in the loading or unloading thereof suffer any longer time to pass than with the use of all due diligence shall be reasonably necessary for the purpose of loading or unloading, not exceeding eighteen hours, unless hindered by the weather; and every such barge, boat, or vessel (except, &c.),

having so completed her loading, shall depart from the place of loading on her course the first ensuing tide, unless hindered by stress of weather, or other just impediment; and no person shall load, take in, carry, or convey, in any wagon, cart, or other land carriage laden with gunpowder, or in any barge, boat, or vessel laden with gunpowder, on any river (except, &c.), any *other lading of any kind whatsoever; and all and every person and persons offending against any of the aforesaid provisions for loading and unloading, shall, for each offence, forfeit the sum of 10l."

Hannen, for the respondent.—The question in this case is one of great importance to the public safety, especially as it is said that railway Companies are in the daily habit of violating stat. 12 G. 3, c. 61, s. 11, on which this conviction is founded. It is a well known canon in construing Acts of Parliament, that the old law, the mischief, and the remedy are to be considered. Under the old law any quantity of gunpowder might be kept anywhere in one building; the mischief was the enormous danger to the public from large quantities of so dangerous an article being thus collected; and the remedy enacted is, that no more than a certain quantity of it shall be brought together in the metropolis and some other places, and the establishing certain safeguards in keeping and carrying it. Sect. 11 prohibits the having or keeping in those places more than a specified quantity of gunpowder; sect. 18 limits the quantity that may be carried at one time; and sect. 21 directs that no carriages or vessels employed for the purpose shall stay or delay at any place of loading or unloading. The words "have" and "keep" in sect. 11, and "have" and "convey" in sect. 18, have each an independent meaning. [MELLOR, J.—Was not sect. 11 meant to apply to dealers and other persons *keeping* more than a certain quantity?] If the construction of the appellant is correct, any quantity of gunpowder may be collected in a warehouse in the metropolis for the purpose of being sent away in small *parcels to different places, and a continual succession of packages of gunpowder may be sent to a warehouse for the same purpose.

Montague Smith (Sleigh with him), for the appellant.—The 12 G. 3, c. 61 is a penal Act, and therefore must be strictly construed. This conviction took place under the 11th section, which is directed solely against the offence of keeping and storing gunpowder in large quantities, and was not meant to apply to the case of a party merely having such quantities in his possession. Such a construction would stop the trade in gunpowder, which the preamble of the statute declares ought to be encouraged; for in order to carry on such a traffic there must be some place for collecting and storing the gunpowder. It is true that sect. 11 says no person shall "have" or "keep" more than a certain quantity of gunpowder in certain places, but the former word is redundant, for the penalty imposed at the end of the section is the forfeiture of all the gunpowder thereby "allowed to be kept." The quantity of gunpowder carried from place to place is greatly increased since the introduction of railways: and when gunpowder is brought by one line of railway to the metropolis to be forwarded thence by another, it is very convenient there should be some halting place in the metropolis; otherwise it would be necessary to forward it by the next passenger train, instead of sending it by night in a goods train.

The warehouse used by the appellant was a mere halting place in the course of a transit.

HANNEN, in reply, observed that railways having been introduced [since stat. 12 G. 3, c. 61, the quantity of gunpowder carried by them could not have entered into the contemplation of the Legislature by which that statute was passed.

CROMPTON, J.—I do not think that this is a "keeping" of gunpowder within 12 G. 3, c. 61, s. 11. I was struck at first by what Mr. Hannen said as to that section using both the words "have" and "keep." It was, however, answered and turned against him by what Mr. Smith pointed out, that at the end of the section the penalty is imposed for keeping a quantity of gunpowder in excess of that "allowed to be kept." The phrase "have or convey" in sect. 18 also induces me to think that in both sections "have" is synonymous with the word that follows it, namely, "keep" in sect. 11, and "convey" in sect. 18; and I am strengthened in that view by the observation of my brother Mellor that sect. 11 seems directed against persons keeping above a certain quantity of gunpowder; which shows the kind of keeping that was meant, that is to say, keeping in the sense of "storing." But one very strong matter to my mind is, that both in the preamble and throughout the Act "keeping" and "carrying" are kept distinct. The preamble recites that it is necessary to make regulations for the "keeping and carriage" of gunpowder; and in the Act we find one set of sections relating to "keeping," and another to "carrying."

The purposes of trade render it necessary that gunpowder should pass through London: and it appears to me that it may make a halt there without infringing this section of the statute. No doubt there is great weight in Mr. Hannen's argument, that there would be a [great stock of gunpowder kept in one place in the *metropolis for a long time, or perhaps always, seeing that as some parcels went out others might come in. But on the other side the argument is unanswerable that, either in the carriage of gunpowder by railways as now, or by vehicles as was the practice when this Act was passed, there must be halting places for it, and I do not see here any provision against them. We need not decide, when a party receives gunpowder in the course of transit for a necessary halt, how long a delay would become a "keeping" within this Act. I am inclined to think it would be so if he kept it for an unreasonable time; and the 21st section, which allows eighteen hours as the reasonable time for unloading gunpowder from barges, &c., seems to afford an analogy. Now it is very properly found by the case that the warehouse where this gunpowder was received was a mere "temporary halting place" during a transit; and it might with propriety be called a transit shed. To deposit gunpowder there for a reasonable time is no offence under this section; if it is an offence within the Act at all it must be under the section against carrying gunpowder.

MELLOR, J. (the only other Judge present), concurred.

Judgment for the appellant.(a)

(a) The 12 G. 3, c. 61, is now replaced by 23 & 24 Vict. c. 139.

*LAWRENCE, Clerk, Appellant, The Churchwardens and Overseers of the Parish of TOLLESHUNT KNIGHTS, [*533 Respondents. May 7.

Tithe rent charge.—Poor rate.—Incumbent.—District parish.

An incumbent, owner of a tithe rent charge, who voluntarily endows a District parish formed, for spiritual purposes, out of part of his own parish, by granting to the minister of such new District parish a rent charge charged on the tithe rent charge, is not entitled, in an assessment to the poor rate, to claim a deduction from the total amount of tithe rent charge in respect of the portion which he has thus granted away.

SPECIAL case, under 12 & 13 Vict. c. 45, s. 11.

This was an appeal by the Rev. Charles Lawrence, clerk, herein-after called the appellant, against a certain rate or assessment, entitled "An assessment for the relief of the poor of the parish of Tolleshunt Knights, in the county of Essex, and for other purposes chargeable thereon according to law," made, assessed and confirmed in December, 1860, after the rate of 9d. in the pound, whereby the appellant was rated and assessed as the owner and occupier of the following property for the amount and in manner following, that is to say :

Name of Occupier.	Name of Owner.	Description of Property rated.	Name of Situation of Property.	Estimated Extent.	Gross Estimated Rental.	Rateable value.
Rev. C. Lawrence.	Himself.	Land, house and buildings. Rent charge at 5s. 2d.	The Rectory.	8 a. 0 r. 15 p.	42l. 10s. 6d.	35l. 5s. 0d.
Ditto.	Ditto.		Commututed.	—	585l. 18s. 0d.	485l. 0s. 0d.

*And the appellant was by the assessment charged with the respective sums of 1l. 6s. 5½d. and 18l. 18s. 9d., being at the rate of 9d. in the pound upon the assessment of 35l. 5s. and 485l. respectively.

The appellant gave notice of appeal against such assessment for the following amongst other reasons.

Because the appellant, if liable to be rated and assessed as the owner or occupier of any property within the said parish was over-rated in respect of the yearly value and profits thereof.

The appellant is the rector of Tolleshunt Knights, and, as such, is seised and possessed of the tithe commutation rent charge and glebe belonging to the rectory, subject nevertheless to the operation and effect of a certain indenture duly made and executed, and bearing date the 10th June, 1858, a copy of which accompanied and was intended to form part of the case.

The District of Tiptree Heath was duly constituted as mentioned in that indenture, and comprises portions of six parishes (one of such parishes being the parish of Tolleshunt Knights), and contains altogether a population of 894.

The population of the said several portions of six parishes was as under:

Portions of the parishes of		Populations.
Inworth . . . . .	.	483
Tolleshunt Knights . . . . .	.	156
Great Wigborough . . . . .	.	127
Tollesbury . . . . .	.	68
Messing . . . . .	.	60
Tolleshunt D'Arcy . . . . .	.	7
		901

*535] *The whole population of Tolleshunt Knights, according to the last census, is 371, and that of Inworth 717.

The whole gross estimated rental of the parish of Tolleshunt Knights (including the cottages, which were rated at one fourth less than other property,) is 2569*l.*, of which the tithe rent charge was 585*l.*, and the glebe 42*l.*

The endowment of the minister of the District church consists of the yearly rent charge or sum of 150*l.*, granted by the said indenture; free and clear from all deductions, taxes, charges, rates, assessments and compositions whatsoever, (except on account of the income tax on property, if any): together with the tithe rent charge upon about sixty-two acres of land in the parish of Great Wigborough and a parsonage house and glebe land.

The rateable value of the rectory house, buildings, and land occupied by the appellant in the parish of Tolleshunt Knights was admitted to be 35*l.* 5*s.*, as assessed.

The gross estimated rental or amount of the tithe commutation rent charge of the appellant at the time of the rate was 585*l.* 18*s.*

In order to arrive at the rateable value of the tithe commutation rent charge, the respondents made the following deductions:

	£ s. d.
Four Poor Rates and two Highway Rates	69 6 5
Collecting and Losses on Tithe at 5 <i>l.</i> per cent. on 585 <i>l.</i> 18 <i>s.</i>	29 7 9
Synodals and Procurations	0 10 0
Yearly tenths	1 13 10
	<hr/>
	£100 18 0

*536] *It was admitted that such deductions were correct; but the appellant claimed also to have deducted, in estimating the rateable value of the tithe commutation rent charge, the amount of the yearly rent charge or sum granted to the minister of the District church of Tiptree Heath, charged thereon by the indenture, and paid by him.

If, in estimating the rateable value of the tithe commutation rent charge, deduction should be made in respect of such yearly rent charge or sum payable under the indenture to the minister of the District church, then the rateable value of the tithe commutation rent charge would stand (subject to the question as to expenses of collection, &c.) at 354*l.* on the following calculation, viz.:

	£	s.	d.
Gross estimated value of Tithe Rent Charge . . .	585	18	0
Less the following deductions:			
Four Poor Rates and two Highway Rates £50 2			
Collection of Tithe and Losses at 5 <i>l.</i> per cent. on 585 <i>l.</i> 18 <i>s.</i> 29 7 9			
Synodals and Procurations 0 10 0			
Yearly tenths 1 18 0			
Yearly rent charge on sum payable to District minister under the said Indenture 150 0 0			
	<u>281</u>	<u>12</u>	<u>9</u>
Leaving rateable value £354 0 0			

Subject to this question, viz., that, if the Court should be of opinion that the deduction of 5*l.* per cent. for the expense of and loss on collection of the tithe rent charge *should not be made on the whole sum of 585*l.* 18*s.*, being the gross amount of the tithe commutation rent charge, but only upon the residue of that amount after deducting 150*l.*, the amount of the yearly rent charge or sum payable to the District minister under the indenture, then the rateable value of such tithe commutation rent charge was to be taken at 360*l.* and no more. [*537

But if the Court should be of opinion that no deduction ought to be made in respect of such yearly rent charge or sum payable to the District minister, then the rateable value of such tithe commutation rent charge was as assessed by the respondents.

It was contended, on the part of the appellant, that he was over-rated in respect of the annual value of the tithe commutation rent charge, because, in estimating the rateable value thereof, no deduction or allowance had been made in respect of the yearly rent charge or sum which he had paid and was liable to pay thereout to the minister of the District church of Tiptree Heath under and by virtue of the indenture.

The respondents, on the other hand, contended that, in estimating the rateable value of such tithe commutation rent charge, the deduction claimed by the appellant in respect of such yearly rent charge or sum ought not to be made.

The question for the opinion of this Court was whether, in estimating the amount at which the appellant ought to be rated or assessed for the relief of the poor of the parish of Tolleshunt Knights in respect of the rateable value of the tithe commutation rent charge, deduction ought or ought not to be made in *respect of the yearly rent charge or sum charged thereon and payable thereout under [*538 the indenture to the minister of the District church in addition to the other deductions made by the respondents as above stated in estimating such rateable value.

The case was argued in Hilary Term, on the 25th January, before Cockburn, C. J., Wightman, J. (who left before it was concluded), Crompton and Mellor, JJ.

Coleridge, for the respondents.—The incumbent is liable to be rated

for the full value of his tithe commutation rent charge. His having agreed, under the stats. 3 & 4 Vict. c. 113, 4 & 5 Vict. c. 89, and 6 & 7 Vict. c. 37, to charge it with a rent charge for the minister of a new district parish formed out of part of his own parish, makes no difference, seeing that that act was done by him voluntarily, without compulsion, and he is consequently in the same position as any private individual who grants a rent charge issuing out of his land.

Goodchild, appellant, The Trustees of St. John, Hackney, respondents, E. B. & E. 1 (E. C. L. R. vol. 96), may be cited; but there the deduction made by the clergyman from his income was forced upon him. The appellant will perhaps rely on the following passage of the judgment in that case, pp. 48-9 :—“Mr. Goodchild is stated to be the rector of a parish containing, in the last parliamentary census, a population of 14,804 souls. Besides the parish church is a District church or chapel, built for the use of a District in the parish containing above *5000 souls. He employs one curate at a salary of 160*l.* per annum; and he also pays 50*l.* a year towards the support of the minister of this District church or chapel. Under these circumstances, he claims to be allowed, under the head of expenses, first, for the 50*l.*; secondly, for the curate's salary; and thirdly, 100*l.* for his personal services as the officiating minister of the parish. We intimated, in the course of the argument, that the facts found as to the payment of the 50*l.* were not sufficient to enable us to give an unconditional answer to the question raised. The case does not disclose the character of the payment. If Mr. Goodchild voluntarily contributes this sum towards the maintenance of a clergyman for the District, and may, if he pleases, withdraw it, however laudable the contribution may be, he can no more claim any allowance in respect of it than he could for any portion of his income which he devotes to charitable purposes. On the other hand, this chapel may have been built, and a District set apart, under some one of the many Acts of Parliament which have been passed with a view to church extension; and by Mr. Goodchild himself, or one of his predecessors, a certain amount of the rent charge may have been virtually separated from the residue as part of the endowment. In such case, though he may with one hand receive the 50*l.*, yet he may be bound to pay it with the other, so that, in substance, it is not his. And, quite apart from the provisions of the statute, he ought not to be rated for it; for it is not beneficially in his occupation, any more than if it had been a portion of the glebe which he had given up for the same purpose. If any one would be rateable for this, it would be, not Mr. Goodchild, but the minister of the District church. It does not appear to us *that this minister can be considered one of Mr. Goodchild's stipendiary curates consistently with the statement.” But the cases of Frend, appellant, The Churchwardens of Tolleshunt Knights, respondents, 1 E. & E. 753 (E. C. L. R. vol. 102), and *Regina v. Groves*, 29 L. J. M. C. 179, 6 Jur. N. S. 1014, are at variance with Goodchild, appellant, The Trustees of St. John, Hackney, respondents, E. B. & E. 1 (E. C. L. R. vol. 96). There is a difference between a stipend paid to a curate and a grant to a District for the endowment of its minister. Moreover, here, the incumbent has conveyed this District rent charge free from all rates and charges; and as Frend, appellant, The Churchwardens

*540]

of Tolleshunt Knights, respondents, 1 E. & E. 753 (E. C. L. R. vol. 102), has decided that such a rent charge is not rateable in the hands of the District minister, the consequence would be that, if the present rate is not upheld, this property would not be rateable at all, which is contrary to the policy of the laws.

Field, contrà.—This was not a voluntary appropriation made by the incumbent in ease of himself; and Goodchild, appellant, The Trustees of St. John, Hackney, respondents, E. B. & E. 1 (E. C. L. R. vol. 96), is therefore applicable, the principle of which was upheld in Williams, appellant, The Churchwardens of Llangeinwen, respondents, 1 B. & S. 699 (E. C. L. R. vol. 101). *Regina v. Groves*, 29 L. J. M. C. 179, 6 Jur. N. S. 1014, is distinguishable, for there the appropriation was not made by the defendant in his character of clergyman.

Coleridge, in reply, observed that Williams, appellant, The Churchwardens of Llangeinwen, respondents, 1 B. & S. 699 (E. C. L. R. vol. 101), *was distinguishable in this, that that was the case of two [*541 parishes forming one benefice from time immemorial. He relied on Wheeler, appellant, The Churchwardens of Burmington, respondents, 1 B. & S. 709 (E. C. L. R. vol. 101), in which this Court intimated that the principle of Goodchild, appellant, The Trustees of St. John, Hackney, respondents, E. B. & E. 1 (E. C. L. R. vol. 96), ought not to be extended.

Cur. adv. vult.

The judgment of the Court was now delivered by

COCKBURN, C. J.—The question in this case is whether an incumbent, owner of a tithe rent charge, who voluntarily endows a district parish formed for spiritual purposes, out of part of his own parish, by granting to the minister of such new district parish a rent charge charged on the tithe rent charge, under the Acts of 3 & 4 Vict. c. 113, 4 & 5 Vict. c. 39, and 6 & 7 Vict. c. 37, can claim, in an assessment to the poor rate, to have a deduction made from the total amount of tithe rent charge, in respect of the portion which he has thus granted away. We are of opinion that he cannot, and that he is properly assessable in respect of the entire tithe rent charge.

It is true that it has been held, in the case of Goodchild, appellant, The Trustees of St. John, Hackney, respondents, E. B. & E. 1 (E. C. L. R. vol. 96), that an incumbent entitled to tithe rent charge who employs a curate, either because he is compelled by the bishop to do so, or because the magnitude of the cure properly requires it, is entitled to have the stipend of such curate deducted from the assessable *value of the tithe rent charge. But we are of opinion, (as, [*542 indeed, we intimated in the recent case of Wheeler, appellant, The Churchwardens of Burmington, respondents, 1 B. & S. 709 (E. C. L. R. vol. 101)), that the principle of the decision in Goodchild, appellant, The Trustees of St. John, Hackney, respondents, E. B. & E. 1 (E. C. L. R. vol. 96), ought to be carried no farther. We think it ought not to be applied to a case where the owner of tithe rent charge voluntarily parts with a portion by creating a rent charge on it to endow another minister. *Prima facie*, tithe rent charge, like any other real property in a parish, is to contribute to the poor rate. But, if the contention of the present appellant were to prevail, so much of the tithe rent charge as has been charged for the endowment of the new district parish would be withdrawn from contribution to the rate.

For, the amount assigned to the minister of the district parish is not assessable in his hands. No portion of the tithe rent charge itself has been conveyed to him,—a charge only on the tithe rent charge has been created by the grant. If, therefore, the amount of the charge in favour of the new minister is not assessable in the hands of the appellant, it ceases to be assessable at all; a state of things of the injustice and inconvenience of which the parish would certainly have a right to complain.

It is unnecessary to consider the case as between the appellant and the minister of the new district. It, no doubt, seems hard that the owner of the tithe rent charge, having, to his own loss, granted a portion of the income thence arising for the spiritual benefit of the *543] district, should be further called upon to pay poor-rate *in respect of what he has thus disinterestedly given up. But it is obvious that protection against loss may be secured in such a case by stipulating in the grant to deduct charges of this nature. It may be that, if the grant were silent, independently of any such stipulation the grantor might be entitled to deduct the amount of the rate from the sum payable. In the present instance, however, the rector has expressly agreed to pay the amount granted free of all rates and charges. No such question could therefore arise between the parties.

As regards the question between the appellant and the parish, we are of opinion that the appellant has been properly rated, and our judgment will therefore be for the respondents.

Judgment for the respondents.

In the matter of The Local Government Act, 1858.

MATLOCK BATH District. April 28.

Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 14.—Less place included within greater.

M. B., a District not having any ascertained or defined boundary, and a portion of the parish of M., obtained from the Secretary of State for the Home Department an order, under sect. 16 of The Local Government Act, 1858, 21 & 22 Vict. c. 98, settling its boundaries for the purposes of that Act, and subsequently adopted the Act within the District. Afterwards the parish of M., adopted the Act. The Court refused a mandamus to the Secretary of State to publish the notice of the adoption of the Act by M. B. District, under sect. 19: holding that sect. 14 applied to places the boundaries of which were settled by an order of the Secretary of State, and therefore that the District of M. B. could not adopt the Act unless the parish of M. had refused to do so.

THIS was an application for a rule calling upon the Right Honourable Sir George Grey, Bart., one of Her Majesty's principal Secretaries of State, to show *cause why a mandamus should not issue, addressed to him, commanding him to cause to be published in the London Gazette, pursuant to the Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 19, a notice of the adoption of that Act by the Matlock Bath District, in the county of Derby, under the provisions of that Act.

Before the order made by the Secretary of State hereinafter mentioned, the District of Matlock Bath was a portion of the parish of

Matlock, in the county of Derby, unconnected with and at a distance from the town of Matlock, and not having any ascertained or defined boundary. Within the last few years the population of Matlock Bath had much increased, many new dwelling-houses had been erected there, and a considerable tract of land had been recently laid out for building purposes. The want of efficient means of local government having given rise to much inconvenience, a meeting of the owners and ratepayers of Matlock Bath was held, on 20th September, 1861, to consider what measures might be taken to obviate such inconvenience, and at that meeting it was unanimously resolved that the necessary proceedings should be taken to enable the owners and ratepayers to adopt the provisions of the Local Government Act, 1858. A petition was accordingly prepared in accordance with the provisions of the 16th section, stating the proposed boundaries of Matlock Bath, and signed by one-tenth of the ratepayers resident within such boundaries; which petition was, on the 2d October, 1861, addressed and sent to Sir George Grey, Bart., one of Her Majesty's Principal Secretaries of State, praying him to settle the boundary of Matlock Bath for the purposes of the Act, and with a view to the adoption thereof in that place. The petition was duly received by the *Secretary of State, and he directed inquiries to be made, in accordance [*545 with the Act, as to the genuineness of the petition, and as to the propriety of the boundaries proposed and described therein, and after the proper notice had been given, such inquiry was duly made by the inspector appointed for that purpose, who duly reported thereon to the Secretary of State.

On the 9th November, 1861, having considered the petition and the report made thereon, and in pursuance of the 16th section of the Act, the Secretary of State made an order "settling the boundaries of the District of Matlock Bath, for the purposes of The Local Government Act, 1858," by which he ordered: 1. That from and after the date thereof, the boundary thereafter described and shown upon the plan thereunto annexed should form the boundary of the District of Matlock Bath for the purpose of the Local Government Act, 1858, and the parts included within the said boundary should thenceforth, for the purposes of such Act, be deemed to be a place with a known and defined boundary, and might adopt the Act accordingly. [The boundaries were then described.] 2. That Mr. Edward Wheatcroft, a resident in Matlock Bath, should be the summoning officer, and take all such steps as might be necessary under the Act for convening a meeting of the ratepayers of the District to decide as to the adoption of the Act within the boundary of the District of Matlock Bath as settled by that order.

On the 13th November, 1861, in accordance with a requisition in writing, and signed by more than twenty ratepayers and owners of and resident within the District of Matlock Bath, a public meeting of the owners *and ratepayers of and in the District was duly convened in accordance with the Act, to determine whether [*546 the Act should be adopted in the District. The meeting was duly held on the 18th of November, and it was resolved unanimously that the Local Government Act should be adopted in the District of Matlock Bath, and notice thereof was given, according to the Act; du-

plices whereof were sent to the Secretary of State, and duly posted up and published.

After the adoption of the Act for the District of Matlock Bath, the Act was adopted for the parish of Matlock, at a public meeting held therein.

On the 5th February, 1862, an application was made to the Secretary of State by the Local Board for the District of Matlock Bath, requesting him to publish in the Gazette, as directed by the Local Government Act, 1858, the notice of the adoption of the Act by that District; and on the 7th February, the Board received a letter dated "Local Government Act Office, February 6th, 1862," and purporting to be written by the direction of the Secretary of State, which stated that, as Matlock parish had also given notice of the adoption of the Act simultaneously with Matlock Bath District, there was a doubt arising under the 14th section of the Local Government Act, as to the power of a District in the position of the Matlock Bath District to adopt the Local Government Act without the previous refusal to adopt by the parish in which it was situated, viz. the parish of Matlock; and, as the Secretary of State had no power of himself to decide the point, he declined to insert in the Gazette the notice of adoption [547] by Matlock Bath District with a view to the "decision by the proper legal tribunal of the question, as to the right of the District to adopt.

Lush (with him *Garth*), in support of the application.—By sect. 12 of The Local Government Act, 21 & 22 Vict. c. 98, "This Act may be adopted,

"(1.) In corporate boroughs to which The Public Health Act, 1848, has not been applied, by a resolution of the council assembled at a meeting held for the purpose;" &c.

"(2.) In other places under the jurisdiction of a Board of Improvement Commissioners, where all or part of the Commissioners are elected by ratepayers, or by owners and ratepayers, by a resolution of such Improvement Commissioners assembled at a meeting held for the purpose."

"(3.) In all other places having a known or defined boundary, by a resolution of the owners and ratepayers."

Sect. 14. "In cases where any place hereby authorized to adopt this Act includes within its limits any less place which, if it were not so included, would of itself be authorized to adopt this Act, such less place shall not be entitled to adopt this Act unless the greater place within the limits of which it is included has refused to adopt the same, or unless it has been determined by one of Her Majesty's Principal Secretaries of State, in manner hereinafter mentioned, that such less place ought, as respects the adoption of this Act, to be excluded from the limits of such greater place."

Sect. 16. "(1.) Any place not having a known or defined boundary may petition one Her Majesty's Principal Secretaries of State to settle its boundary for the purposes of this Act;"

*"(2.) The petition shall state the proposed boundaries of [548] the place, shall be signed by one-tenth of the ratepayers resident within such boundaries, and shall be supported by such evidence as the Secretary of State may require:"

"(3.) Upon the receipt of such petition the Secretary of State may direct inquiry to be made as to the genuineness of the petition, and as to the propriety of the proposed boundaries; and"

"(4.) Fourteen days' notice of the time, place, and subject of such inquiry shall be given in the place to which it refers;"

"(5.) The said Secretary of State may, upon consideration of the matter, either dismiss the petition altogether, or make order as to the boundaries of the place: He may also make order as to the costs of the proceedings under this section and the parties by whom such costs are to be borne:"

"(6.) Any place the boundaries of which have been settled in pursuance of the foregoing provisions shall thenceforth, for the purposes of this Act, be deemed to be a place with a known and defined boundary, and may adopt this Act accordingly; and for the purpose of enabling it so to do a summoning officer shall be appointed by the order settling the boundaries, whose duty it shall be forthwith to take all such steps as may be necessary for convening a meeting of the ratepayers to decide as to the adoption of this Act;" &c.

By sect. 17, In cases where a resolution adopting the Act has been passed in any place, if a certain proportion of the owners and ratepayers of such place "are desirous that the whole or any part of such place shall be excluded from the operation of this Act, they may present a *petition to one of Her Majesty's principal Secretaries [*549 of State, appealing against such resolution, and praying that such exclusion may be made:" and such petition shall, where the exclusion of part of a place is prayed for, state the part of the place proposed to be excluded, and the reasons for such exclusion; and, upon the receipt of any such petition, the Secretary of State may direct inquiry in the proposed District as to the genuineness of the petition, and the matters alleged therein; and shall make order with respect to the matter in question on such appeal, and such order shall be binding on the place in respect of which it is made.

Section 14 has a direct reference to sect. 12: it describes the less place as one which, if not included within the limits of the larger, would "of itself" be authorized to adopt the Act, and applies to the places, mentioned in sect. 12, "having a known or defined boundary," such as townships or hamlets included within the limits of a parish. Sect. 16 applies to a different class of cases, and virtually excludes smaller places included within the limits of larger; for, when the boundaries of a place which had no known or defined boundary have been settled by the Secretary of State, the place may adopt the Act "accordingly," that is, according to his order. If sect. 16 is not construed as excluding such places, it would be inconsistent with sect. 14. [COCKBURN, C. J.—Suppose two cases of a less place included within the limits of a larger, one of them having a known or defined boundary and the other not: when the latter has, under sect. 16, become a place with a known and defined boundary, they must both be upon the same footing with reference to sect. 14. Why should the latter be in a better position with reference to the adoption of the Act *than the former?] In either case an inquiry, at the instance [*550 of the less place objecting to be included in the larger, is to be instituted by the Secretary of State, and that inquiry is not to be

repeated. The Secretary of State has decided the question whether this District should have a known and defined boundary. [CROMPTON, J.—The Secretary of State has no power to order anything about the adoption of the Act. COCKBURN, C. J.—The petition to the Secretary of State, under sect. 16, is only for setting out the boundary, not for the adoption of the Act, and it is an *ex parte* proceeding: the Secretary of State, having settled the boundary, becomes *functus officio*.] One of the elements for the consideration of the Secretary of State in settling the boundary is whether the place should be a District authorized to adopt the Act,—he cannot take into consideration whether it ought to have a defined boundary without considering what the effect of that would be with reference to its becoming such a District. Sect. 16 is the only one which separates a place for the purpose of enabling it to adopt the Act. Sect. 17 gives an appeal to the Secretary of State for the purpose of excluding the place altogether from the operation of the Act. [CROMPTON, J.—Sect. 17 clearly applies to all the preceding sections, and is referred to at the end of sect. 14. But the two questions are different—whether the place is a township or hamlet which ought to be excluded from the limits of a larger place, or whether, with reference to the whole area in which a resolution adopting the Act has been passed, a part of it should be excluded from the operation of the Act.] The question whether it is fit that one part should be severed from another must be inquired into in both cases.

*COCKBURN, C. J.—I am of opinion that there ought to be
*551] no rule. The terms of stat. 21 & 22 Vict. c. 98, s. 14, are general, and apply to any place in a position to adopt the Act. The District which makes the present application has brought itself within the prohibition in that section by obtaining an order of the Secretary of State settling its boundaries, and therefore is not entitled to adopt the Act, there having been no refusal to adopt it by the greater place within the limits of which that District is included. The argument of Mr. Lush arises on sect. 16, which relates to a place which hitherto has not had a known or defined boundary, and enables the Secretary of State to settle its boundaries, so that it may be in a position to adopt the Act; and Mr. Lush says that, when the Secretary of State has done this, that District has a right to adopt the Act without more; in other words, that the 16th section supersedes the enactment of the 14th. But I think that it does not. The whole series of sections is to be taken together; and the expressions in article 6 of the 16th section mean no more than that a District which, being without a known or defined boundary, has its boundaries settled by an order of the Secretary of State, shall be in the same category as a place having originally a known or defined boundary without such intervention. The difficulty, if there is any, arises from the iuartistic arrangement of the clauses; but I do not think the mere fact of the 16th section being subsequent to the 14th is sufficient to raise any serious doubt as to the intention of the Legislature.

CROMPTON, J.—I am entirely of the same opinion. *In stat.
*552] 21 & 22 Vict. c. 98, there is a connected series of sections from the 12th to the 16th inclusive, having reference to the adoption of the Act. Sect. 12 mentions three classes of places which may adopt the

Act, and contains different regulations as to the steps to be taken by each for that purpose. Sect. 14 is introduced to meet the obvious difficulty which there would be when one place which has a known and defined boundary includes within its limits another which also has a known and defined boundary; and it gives the larger place the first choice of adopting the Act. The District which makes this application cannot adopt the Act unless it applies to the Secretary of State, under sect. 16, to settle its boundaries. A question has been raised on the location of sect. 14,—if it had been placed after sect. 16 there could have been no doubt: but I think it is to be construed as if it had been so placed. Then, sect. 16 having made provision for places not having a known and defined boundary, a fourth class of places which shall be taken as having a known and defined boundary is introduced. The Secretary of State is only to determine whether the place petitioning him to settle its boundary ought to have the choice of adopting the Act; and, if he settles its boundaries under sect. 16, it is brought into that category, and may do so. The smaller place having made itself a place with a defined boundary, can do nothing until the larger place has refused to adopt the Act.

BLACKBURN, J.—I think the construction of the Act is clear when sects. 12 to 16 are read together. Sects. 12 and 16 relate solely to the boundary of places which *may adopt the Act. Sect. 12 [*553 specifies three classes of such places. Sect. 13 provides how, in each of these classes, meetings to decide as to the adoption of the Act shall be summoned; and,—for the present, passing over sects. 14 and 15,—sect. 16 provides that any place not having a known or defined boundary may petition the Secretary of State to settle its boundary. On the receipt of the petition, he inquires not as to the fitness of the place for adopting the Act, but as to the propriety of the proposed boundaries; and then “any place the boundaries of which have been settled in pursuance of the foregoing provisions shall thenceforth, for the purposes of this Act, be deemed to be a place with a known and defined boundary, and may adopt this Act accordingly,” that is, shall be added to the three classes mentioned in sect. 12: it then provides how, in this fourth class of places, a meeting shall be summoned to decide as to the adoption of the Act. Sect. 14, which in proper style of drafting would have been placed after sect. 16, applies to a place including within its limits a less place, which, if it were not so included, would of itself be authorized to adopt the Act. No doubt the District which makes the present application, before it had a defined boundary, was not authorized to adopt the Act; but, after its boundary had been settled, I am unable to perceive why it should not be considered a place with a known and defined boundary for the purpose of sect. 16 as well as other sections. If so, it is brought within sect. 14: and therefore it cannot adopt the Act until the larger place within the limits of which it is included has refused to adopt it. And, if the larger place does adopt the Act, *there is one other way [*554 of proceeding, according to which the smaller place may be excluded from its operation, viz., by appeal to the Secretary of State, under sect. 17. That section, which empowers the Secretary of State to allow the exclusion, is quite as applicable to the case in which the boundary is ascertained by an order of the Secretary of State, under

sect. 16, as where the place has a known and defined boundary within sect. 12. A reasonable scheme of legislation requires that this District should be construed to be within sect. 14.

MELLOR, J.—Sect. 16 of stat. 21 & 22 Vict. c. 98, contains provisions for forming a fresh class of Districts, the boundaries of which are to be settled by an order of the Secretary of State. Then, looking at sect. 14, it will appear that while the policy of the Act is to encourage the formation of Districts adopting the Act, it is not its policy to multiply smaller Districts; and I do not see why it should intend to make a difference between Districts to be formed under sect. 16 and those which had been already referred to in sect. 14.

Rule refused.

*THE QUEEN, on the prosecution of the Burial Board of the
*555] Parish of WALCOT v. The Overseers of the Parish of WALCOT. May 7.

15 & 16 Vict. c. 85, ss. 10, 11.—20 & 21 Vict. c. 81, s. 5.—*Burial Board.—Parish divided under stat. 58 G. 3, c. 45.*

By stat. 15 & 16 Vict. c. 85, ss. 10, 11, extended to the whole of England by stat. 16 & 17 Vict. c. 134, the vestry of any parish, having resolved that a burial ground shall be provided for the parish, shall appoint a Burial Board. By sect. 52 “Parish” shall mean every place having separate overseers of the poor, and separately maintaining its own poor.” Mandamus to the overseers of the parish of W., reciting that a Burial Board had been appointed for that parish, commanded them to pay out of the poor rates of the parish the expenses incurred by that Board. Return: that, in 1840, before the constitution of the Burial Board for the parish of W., that parish had been, under stat. 58 G. 3, c. 45, divided into three separate parishes for all ecclesiastical purposes; but did not show that either of the new parishes had appointed a Burial Board under stat. 20 & 21 Vict. c. 81, s. 5. Held no answer.

MANDAMUS to the overseers of the poor of the parish of Walcot, in the county of Somerset. The writ recited that in and for the parish of Walcot there was a Burial Board duly and lawfully constituted pursuant to the statutes in that case made and provided, and that the Burial Board had incurred certain expenses in carrying the statutes into execution, to wit, the sum of 48*l.* 9*s.* 8*d.*, which expenses, by the statutes, are chargeable upon and to be paid out of the rates for the relief of the poor of such parish; that a certificate, under the hands and seals of certain members of such Board as were authorized to exercise the powers of the Board, of the sum above mentioned was duly served upon the defendants, and that they were thereby then required to pay such sum to the clerk to the Board for and on behalf of the Board; which they had refused to do. The writ then commanded them to pay, or, if necessary, raise by due course of law and pay, the *556] sum of 48*l.* 9*s.* 8*d.*, *pursuant to the certificate of the Board, and to the statutes in such case made and provided.

Return. That the church of the parish of Walcot, before and at the time of the division of the parish into three distinct and separate parishes as thereafter mentioned, had been and was a rectory; and that, before the constitution of the Burial Board for the parish of Walcot, and before the passing of any resolutions by the vestry of that parish that a burial ground should be provided for it, the parish

of Walcot had been and was, by an order in council duly made on the 5th March, A. D. 1840, in pursuance and under the authority of stat. 58 G. 3, c. 45, intituled "An Act for building and promoting the building of additional churches in populous parishes," divided into three distinct and separate parishes,—named respectively the parish of Walcot St. Swithin, the parish of St. Saviour, and Trinity parish,—for all ecclesiastical purposes whatever, in accordance with and in pursuance of the provisions of the said Act; and that such division had, before the constitution of the Burial Board, and before the passing of any resolution by the vestry of the parish that a burial ground be provided for the parish, become complete by the resignation of the spiritual person who was the incumbent of the parish of Walcot at the time of such division, and had so continued from thence hitherto; and that, before and at the time of such division so becoming complete, there was, in each of the divisions into which the parish of Walcot was divided respectively, a separate and distinct church or chapel duly consecrated in that behalf and as required by law; and that, after the said division had become complete, and before the constitution of the Burial Board, and before the passing of any resolution *by the vestry of the parish of Walcot that a burial ground should be provided for the parish, the said churches or chapels [*557 respectively became and were used and appropriated as the parish churches of the said three distinct and separate parishes respectively, and had so continued from thence hitherto.

Demurrer, and joinder therein.

*Kinglake, Serjt. (T. W. Saunders with him), in support of the demur-
rer.—Although the original common law parish of Walcot had been
divided, under The Church Building Act, 58 G. 3, c. 45, s. 16, into
three separate and distinct parishes for ecclesiastical purposes, it re-
tained the right to appoint a Burial Board for the whole parish, in
pursuance of sect. 11 of stat. 15 & 16 Vict. c. 85, which is the Burial
Act for the metropolis, but by stat. 16 & 17 Vict. c. 134, s. 7, is ex-
tended to parishes not in the metropolis. The parish of Walcot
remains one parish for the purposes of the poor rate; and therefore is
within the interpretation clause, sect. 52, of stat. 15 & 16 Vict. c. 85,
which says, "'Parish' shall mean every place having separate over-
seers of the poor, and separately maintaining its own poor.' By sect.
19 the expenses incurred by the Burial Board in carrying the Act
into execution in any parish are to be paid out of the poor rates raised
throughout the parish, and therefore it is proper that the ratepayers
of that parish should have control over the Board. [CROMPTON, J.,
referred to Regina, on the prosecution of the Burial Board of Amer-
sham, *v.* The Overseers of Coleshill, 31 Law Journ. Q. B. 219, 9 Jur.
N. S. 226, argued a few days previous, and in which judgment was
delivered in the ensuing Trinity Term.]*

*Further, neither of the ecclesiastical parishes into which the original parish was divided had power to form a separate Burial Board for itself. Under stats. 18 & 19 Vict. c. 128, s. 12, and 20 & 21 Vict. c. 81, s. 5, districts not separately maintaining their own poor have the power of appointing a Burial Board; but there is nothing in those Acts to take away the power of the original parish to appoint one. [He referred to sect. 35 of stat. 15 & 16 Vict. c. 85.] Although it is

not alleged in the writ, the Burial Board was in fact appointed before the passing of stat. 28 & 24 Vict. c. 64, so that sect. 4, which provides that where a parish has been divided into Districts for ecclesiastical purposes, and one of them has a separate burial ground, the entire parish shall not appoint a Burial Board without the approval of one of the Secretaries of State, does not apply. That enactment however assumes that, notwithstanding such division, the entire parish had the power of appointing a Burial Board.

Montague Smith (Kingdon with him), contra.—Where a parish is divided into distinct and separate parishes for ecclesiastical purposes under sect. 16 of stat. 58 G. 3, c. 45, it is enacted, by sect. 24, that the churches assigned to such districts shall be the District parish churches of such District parishes “for all purposes of ecclesiastical worship and performance of ecclesiastical duties, and as to all marriages, christenings, churchings and burials, and the registering thereof respectively within the same, and in relation to all fees, oblations and offerings;” and, by sect. 27, “that all Acts of Parliament, laws and customs relating to publishing banns of marriage, marriages, christenings, churchings and burials, and the *559] registering thereof, and to all ecclesiastical fees, oblations or offerings, shall apply to such separate and distinct parishes and District parishes so made as aforesaid,” &c. Section 33 enables the Commissioners to accept sites for building churches and providing churchyards for new District parishes. These sections show that the division of the parish applies to burials as well as other purposes more strictly ecclesiastical. [COCKBURN, C. J.—I never heard that a parishioner was denied his right to burial in the old parish burial ground because he resided in a new District parish. CROMPTON, J.—Would a house having a faculty for a pew in the old parish church lose it when, by the division of the parish, it ceased to be in the old parish?] A prescription for such a pew would no longer be good. [COCKBURN, C. J.—Is not burial a secular as well as an ecclesiastical right? The Legislature treats it as a secular matter, because it gives to the vestry the power of determining whether a new burial ground shall be provided. MELLOR, J.—The sanitary objects contemplated by the Burial Acts to a great extent supersede the ecclesiastical. CROMPTON, J.—Burial cannot be called wholly an ecclesiastical matter when a wall or fence is erected between the consecrated and the unconsecrated parts of the burial ground, the one for members of the church and the other for dissenters.] The definition of the word “parish” in sect. 52 of stat. 15 & 16 Vict. c. 85, does not exclude a parish which does not separately maintain its own poor: *Regina v. The Sudbury Burial Board*, E. B. & E. 264 (E. C. L. R. vol. 96). [CROMPTON, J.—The test of how the money for the expenses of the joint burial ground could be raised was not applied in that case: if it had, the result might have been different. *BLACKBURN, J.—In that case the Court said *560] that the words “shall mean” in sect. 52 were to be read as “shall extend so as to include.”] Sect. 23 enables the vestries of several parishes to provide a burial ground for the common use of their parishes, and to have one joint Burial Board: if it was wished to have a common burial ground for the three ecclesiastical parishes or districts into which the old parish has been divided, proceedings for that

purpose should have been taken under that section. [COCKBURN, C. J.—That section applies where independent parishes concur.] It could not have been the intention of the Legislature that there should be a burial ground for the whole parish and a burial ground for each ecclesiastical parish or district. [COCKBURN, C. J.—We must take it that there was a common burial ground for the whole parish ; and that neither of the ecclesiastical parishes or districts has a Burial Board or separate burial ground,—de non apparentibus et non existentibus eadem est ratio.] By stat. 20 & 21 Vict. c. 81, s. 5, “the vestry, or meeting in the nature of a vestry, of any parish, new parish, township, or other district not separately maintaining its own poor, and which has had no separate burial ground, may appoint a Burial Board.” [COCKBURN, C. J.—But you must go the length of saying that this power given to the minor parish created under stat. 58 G. 8, c. 45, ousts the power of the common-law parish. Suppose that, under the powers of stats. 15 & 16 Vict. c. 85, and 16 & 17 Vict. c. 134, the original parish had appointed a Burial Board, and had raised money for the purpose of establishing a new burial ground, and charged it on the poor rates of the whole parish, how can one of the component parts, when formed *into a new parish or ecclesiastical district, [*561 release itself from the obligation of contributing to defray the common expenses ?] By sect. 5 of stat. 20 & 21 Vict. c. 81, it is provided that, when the new parish has appointed a Burial Board, “all the powers of any other vestry or meeting and Burial Board, if any, shall then cease and determine,” so far as relates to such new parish. [COCKBURN, C. J.—The new parish can only avail itself of that provision if it has appointed a Burial Board before the entire parish has exercised its right of appointing a Burial Board. The assent of one of the Secretaries of State was made necessary by stat. 28 & 24 Vict. c. 64, s. 4, for the purpose of meeting this inconvenience.]

Kinglake, Serjt., in reply.—Stat. 20 & 21 Vict. c. 81, s. 5, at any rate, does not apply until the new ecclesiastical parish or district has acted under it. Stat. 58 G. 8, c. 45, s. 24, which enacts that the new Districts shall be separate and distinct District parishes for ecclesiastical purposes, mentioned burials amongst those purposes solely because the mode of burial is matter of ecclesiastical cognisance : 1 Burn Eccl. Law, by Phillimore, p. 262, 9th ed. [He was then stopped.]

COCKBURN, C. J.—We are all agreed that this return is bad, and that our judgment ought to be for the Crown.

In the first place it is important to see how the case would have stood if stat. 15 & 16 Vict. c. 85, which was passed for the metropolis but was extended to the rest of England by stat. 16 & 17 Vict. c. 134, had stood alone. By sect. 10 a meeting of the vestry of the parish is to be convened for the purpose of determining whether a burial ground shall be provided for the parish ; and, *if they resolve that a burial ground shall be provided, sect. 11 requires them to appoint a Burial Board, and the following sections give that Board the necessary powers,—among others, that of providing and laying out a burial ground, and of charging the price on the poor rates of the entire parish, to be repaid in a given number of years, and of charging the annual expenses on those rates. There is no reference in the Act to parts of an entire common-law parish, into which it may have been

divided for ecclesiastical purposes under stat. 58 G. 3, c. 45, or other Church Building Acts; and by the interpretation clause, sect. 52, "‘Parish’ shall mean every place having separate overseers of the poor, and separately maintaining its own poor." The whole scheme of the statute is to throw the expense of burial upon the poor rates of those parishes which may avail themselves of its provisions. There is no provision for ecclesiastical parishes into which a common-law parish may have been divided; and, inasmuch as the expenses of the burial ground are to be defrayed out of the poor rates of each parish maintaining its own poor, it is plain that an ecclesiastical parish, as distinguished from the aggregate parish maintaining its own poor, has no means of meeting those expenses. But it cannot be supposed that when the Legislature gave power to Her Majesty in council, upon the representation of one of the principal Secretaries of State, to close places hitherto used for burial, and enabled parishes to provide new places of burial, they could have intended to deprive ecclesiastical parishes of the right to bury in the new burial ground. Therefore it is only consistent with common sense and reason to construe the word "parish," in sect. 10 of stat. 15 & 16 Vict. c. 85, in the largest sense, [as embracing the whole parish, into however many parishes *563] or districts it may be divided for ecclesiastical purposes, but united for the purpose of maintaining the poor. If, therefore, the question depended on stat. 15 & 16 Vict. c. 85 alone, I should have no difficulty in saying that the appointment of a Burial Board for the whole parish was a proper exercise of the powers vested in the vestry of the parish by that statute.

Subsequent statutes confirm this view.

The first is stat. 18 & 19 Vict. c. 128. The 12th and 13th sections, which introduce an exception, to a certain extent, from the former statute, by enabling the vestry, of a "parish, township, or other district not separately maintaining its own poor, which has heretofore had a separate burial ground," to appoint a Burial Board for itself; and where one of these, which does not separately maintain its own poor, but forms part of a parish maintaining its own poor, has a separate Burial Board, the provisions of the former Act with reference to expenses are applicable to it. This shows that, but for that provision, the smaller parish or district would not have been a parish within stat. 15 & 16 Vict. c. 85.

Then, by stat. 20 & 21 Vict. c. 81, s. 5, the Legislature extends the power of appointing a Burial Board to a "parish, new parish, township, or other district not separately maintaining its own poor, and which has had no separate burial ground;" and the Burial Board, when appointed, may exercise all the powers given by the former statutes, which includes the power of charging the expenses upon the poor rates; and then follows this remarkable proviso, that as soon as that appointment has been made "all the powers of any other vestry or meeting and Burial Board, if any, shall then cease and determine, so far as relates to such parish, new parish, township, or district." *564] It is unnecessary to decide, *because the return does not raise the question, whether, if either of the ecclesiastical parishes or districts had appointed a Burial Board, that would have ousted the vestry and the Burial Board of the common-law parish. But sect.

5 of stat. 20 & 21 Vict. c. 81, is cogent and conclusive to show that, in the absence of this subsequent legislation, the vestry and Burial Board of the parish would have had full power over the whole parish ; because the proviso assumes that, but for it, the powers of the vestry and Burial Board of the whole parish would remain unaffected.

I have, therefore, no doubt that, under stat. 15 & 16 Vict. c. 85, the vestry of the whole parish had power to appoint a Burial Board, and that the board so appointed might exercise all the powers given to a Burial Board under that Act, with reference to the burial ground established under it, through the entire area formed by the component parts of the parish.

CROMPTON, J.—I also am of opinion that the return is bad. It amounts to no more than that the parish of Walcot has been divided into three parishes or districts for ecclesiastical purposes under the Church Building Acts. We must take the appointment of this Burial Board to have occurred after the passing of stat. 20 & 21 Vict. c. 81, and before the passing of stat. 23 & 24 Vict. c. 64 ; so that the latter statute cannot apply. Then, it is clear, upon the construction of stat. 15 & 16 Vict. c. 85, which has been extended to the whole of England by stat. 16 & 17 Vict. c. 134, that the bodies to appoint the Burial Board are the vestries for secular purposes, which are the vestries for the whole parish, they alone having control over the poor rates. It appears from the interpretation clause, sect. 52, and the whole tenor *of the Act, together with schedule (A) in which parishes known to be divided into ecclesiastical districts are [*565 specified, that the policy of the framers of the Act was to make this a matter for the vestry having the regulation of secular matters in a parish, and not merely for those connected with ecclesiastical duties and the established church, because the persons charged with the expenses of providing a cemetery for all Her Majesty's subjects in the parish are not merely those who resort to church, but all who contribute to the poor rates. And it is a strong argument that the Legislature, in every case in which the Act is to apply, prescribes how the necessary funds are to be raised ; whereas an ecclesiastical parish or district not having a poor rate has no means of raising them under that statute. Where two or more parishes maintaining their poor have provided one Burial Board for their common use under sect. 23 there is no difficulty, because the joint Burial Board may make their orders on the several parishes, and so charge the rates with the expenses incurred in providing and maintaining the common burial ground ; but, under that statute, the smaller ecclesiastical parish or district could not affect the poor rate which the vestry would lay on the entire parish. Therefore it is clear that under stat. 15 & 16 Vict. c. 85, if it stood alone, the power of appointing a Burial Board for the whole parish is in the parochial authorities of the whole parish.

Then is the case within any of the enactments in the later Acts ? It appears to me that the later Acts intend to bring back this matter more within the ecclesiastical authorities wherever there exists a common bond of union. Stat. 18 & 19 Vict. c. 128, s. 11, has that effect when several parishes have been united together for *ecclesiastical purposes. Then sections 12 and 13 are applicable to [*566 such an ecclesiastical parish or district as this : the former enables the

vestry of a parish or district not separately maintaining its own poor, but having a separate burial ground, to appoint a Burial Board. It does not, however, appear upon the return that this case is within that category; because the return is silent as to the appointment of a Burial Board for either of the ecclesiastical parishes or districts. And, supposing there had been such an appointment, I do not see that the power of the vestry of the parish at large, for the purpose of rating, would be taken away, there being no words declaring that their power should then cease. It is, however, unnecessary to consider this question, as no Burial Board has been or could be appointed for this ecclesiastical parish or district under stat. 18 & 19 Vict. c. 128, according to the facts stated in the return.

Then, the return not being good under either of the preceding statutes, we come to stat. 20 & 21 Vict. c. 81, s. 5, which repeats very nearly the enactment in sect. 12 of stat. 18 & 19 Vict. c. 128, extending it to new parishes and districts, which previously had not had a separate burial ground; it enacts "that the vestry, or meeting in the nature of a vestry, of any parish, new parish, township, or other district not separately maintaining its own poor, and which has had no separate burial ground, may appoint a Burial Board." The word "may," in some cases, has been rightly construed to mean "must," as where judicial powers are to be exercised on a given state of facts; but here the enactment appears to me to be permissive only, giving the vestry of the smaller ecclesiastical parish or district power, if it chooses, to appoint a Burial Board; "and such vestry or meeting, *567] and the Burial Board appointed by it, shall exercise and have all the powers" given under stat. 18 & 19 Vict. c. 128. This therefore would give the smaller ecclesiastical parish or district power to appoint a Burial Board. And then what is to happen? The proviso says, "all the powers of any other vestry or meeting and Burial Board, if any," (having reference to the former legislation and to the possibility of the existence of a vestry or Burial Board for the larger area in which the ecclesiastical parish or district was included), "shall then cease and determine, so far as relates to such parish, new parish, township, or district," that is, when the smaller ecclesiastical parish or district has exercised its option and made an appointment; and until then it is clear that all the powers of the former body continue. These words show that, unless brought within the category of the latter part of the section, their powers were not to cease.

It is therefore, as I have said, sufficient for the determination of the present case that, according to this return which is to be construed strictly, neither ecclesiastical District has made any appointment. At the same time it is important to notice, as the Lord Chief Justice has observed, that such appointment would not affect any powers already exercised by them; for instance, if they had charged the whole parish, that charge would remain binding; though the smaller ecclesiastical District, if they wished, might have a Burial Board and a separate burial ground. I do not see anything in the section to relieve them from a liability or obligation incurred before they exercised the option of appointing a Burial Board.

The only other point is on stat. 23 & 24 Vict. c. 64, s. 4, which had

not passed when this Burial Board was appointed ; and therefore does not alter the law under which it was appointed.

*On all these grounds I am of opinion that the return is bad. [*568]

BLACKBURN, J.—I also am of opinion that, on the return to this mandamus, our judgment ought to be for the Crown.

The original statute, 15 & 16 Vict. c. 85, was passed with reference solely to the metropolis, and appears to have been drawn with consideration ; for there has been no litigation on it, and it seems to work satisfactorily. The Legislature chose to extend these laws concerning the burial of the dead beyond the limits of the metropolis ; and, instead of passing a new statute applicable to the exigencies of parishes throughout the country, they merely enacted, by stat. 16 & 17 Vict. c. 134, s. 7, that certain provisions of the Metropolitan Act should extend and be applicable to and in respect of any parish not in the metropolis. This was soon found not to work well. And, as difficulties occurred, the Legislature, instead of introducing a new and complete statute, have from time to time passed amending statutes ; and the consequence is that there are, I believe, six statutes, applying to this subject-matter, to be read together, and reconciled, if possible. It is, therefore, no wonder that difficulties should arise in construing the different sections of these statutes. But, in the present case, on the point actually in question there is no difficulty.

The writ recites that a Burial Board had been constituted for the parish of Walcot, and, *prima facie*, Walcot is a parish in every sense of the word so as to be entitled to appoint a Burial Board. The return is confined to this : That before the Burial Board was appointed the parish of Walcot had been divided into three sub-parishes, for ecclesiastical purposes, under stat. 58 G. 3, c. 45.

*These latter are, for some purposes, parishes ; and if the power of appointing a Burial Board had been given to any "parish," without defining that word, it might have been a question whether the whole ancient parish, or each of the ecclesiastical parishes or districts, were a "parish" within the meaning of that statute ; but the interpretation clause, sect. 52, puts an end to all doubt, by defining "parish" to mean a place "having separate overseers of the poor, and separately maintaining its own poor." The original parish of Walcot remains a parish in that sense : although divided ecclesiastically, it still supports its own poor, and has officers for the whole parish for that purpose.

Then, has any subsequent legislation taken away from this parish its power to appoint a Burial Board ? Mr. Smith contended that it was a separate parish for the purposes of burial, and pointed out the 24th and 27th actions of stat. 58 G. 3, c. 45, under which a parish is divided into Districts for ecclesiastical purposes. Those sections contemplate that each District may have a separate burial ground ; not that it must have such, nor that a District cannot be divided for ecclesiastical purposes without having such.

If either of the Districts had acquired a separate burial ground, and this case was subsequent to the passing of stat. 23 & 24 Vict. c. 64, it seems that a point might have been raised that the case would have come within the 4th section of the last mentioned statute, and therefore a Burial Board could not have been appointed for the entire

parish without the sanction of the Secretary of State. But, in order to raise that question, the return must have shown that the ecclesiastical parishes or districts, or one of them, had a separate burial ground, and that the Burial Board for the entire parish had been appointed [since the passing of stat. 23 & 24 Vict. c. 64, and that the approval of the Secretary of State had not been given :—whereas the return rests simply on this; that, after a parish has been divided into ecclesiastical parishes or districts, it is impossible that there should be a Burial Board for the entire parish.]

Also, under stat. 20 & 21 Vict. c. 81, s. 5, either of these ecclesiastical parishes or districts, though not separately maintaining its own poor, and not having a separate burial ground, may appoint a Burial Board and acquire a burial ground; and whenever such an appointment has been made, a question of some difficulty will arise as to the effect of the proviso in that section, that all the powers of any other vestry and Burial Board, if any, shall cease and determine, so far as relates to such parish or district. As at present advised, I should agree with the Lord Chief Justice and my brother Crompton. But, in order to raise that question, the return ought to have alleged, as a matter of fact, that such an appointment had been made.

It is sufficient, in order to give judgment in the present case, to say that a parish, having separate overseers of the poor, and separately maintaining its own poor, is a “parish” competent, under stats. 15 & 16 Vict. c. 85 and 16 & 17 Vict. c. 134, to appoint a Burial Board; and no subsequent legislation takes this power away from such a parish upon its division into separate parishes for ecclesiastical purposes.

MELLOR, J., concurred.

Judgment for the Crown.(a)

(a) See the next case.

[*571] *The QUEEN, on the prosecution of the Burial Board of the Parish of ST. SAVIOUR, Bath, v. The Overseers of the Parish of WALCOT ST. SWITHIN, Bath. May 7.

20 & 21 Vict. c. 81, s. 5.—*Burial Board.—District parish for ecclesiastical purposes.*

Stat. 20 & 21 Vict. c. 81, s. 5, enacts that the vestry of any parish, new parish, township, or other district not separately maintaining its own poor, and which has no separate burial ground, may appoint a Burial Board; and such vestry, and the Burial Board appointed by it, shall exercise and have all the powers which they might have exercised and had if such parish, new parish, township or district had had a separate burial ground before stat. 18 & 19 Vict. c. 128; provided that all the powers of any other vestry and Burial Board, if any, shall then cease and determine, so far as relates to such parish, new parish, township or district. A mandamus, reciting that the parish of W. had been divided into three parishes for ecclesiastical purposes, and that the vestry of the parish of St. S., being one of them, had appointed a Burial Board, and resolved that a burial ground should be provided, and that the Burial Board should be authorized to incur expenses for that purpose, and that the Burial Board had certified that 49*l. 5s. 9d.* was required for defraying expenses incurred, and directed the overseers of the parish of W. to pay such sum to the clerk of the Burial Board; commanded the overseers to pay or raise the said sum according to the certificate. Return: that, before the meeting of the vestry of St. S. for determining whether a burial ground should be provided for that parish, a Burial Board was appointed for the original parish of W. Held no answer; as the appointment of a Burial Board for the original parish did not prevent the ecclesiastical parish of St. S. from appointing a separate Burial Board under stat. 20 & 21 Vict. c. 81, s. 5.

MANDAMUS to the overseers of the poor of the parish of Walcot St. Swithin, in the city of Bath. The writ recited that by an Order in Council, dated the 5th March, A. D. 1840, made upon a representation of the Commissioners for building new churches, the parish of Walcot St. Swithin was divided for all ecclesiastical purposes whatsoever into three distinct and separate parishes, under and by virtue of stat. 58 G. 3, c. 45, intituled "An Act for building and promoting the building of additional churches in populous parishes," and *the three parishes were respectively named Walcot St. Swithin, St. Saviour and Trinity : that the parish of St. Saviour did not separately maintain its own poor, and had not theretofore had any separate burial ground : that since the division the inhabitants of each of the three ecclesiastical parishes had been accustomed to meet in separate and distinct vestries for ecclesiastical purposes, and to elect separate churchwardens : that it appearing that the place of burial in the parish of St. Saviour was insufficient, the churchwardens of that parish, under and by virtue of and according to the statutes concerning the burial of the dead, to wit, on the 27th January, A. D. 1859, convened a meeting of the vestry of the parish of St. Saviour for the special purpose of determining whether a burial ground should be provided for the parish of St. Saviour pursuant to the said statutes ; and that public notice of such vestry meeting, and of the place and hour of holding the same, and of the special purpose thereof, was given in the usual manner in which notices of the meetings of the vestry were given seven days before holding such vestry meeting ; and by which vestry it was resolved that a burial ground should be provided under the said statutes for the parish of St. Saviour ; and a copy of such resolution, extracted from the minutes of the vestry, and signed by the chairman, was afterwards sent to one of the principal Secretaries of State pursuant to the said statutes : that after such resolution the vestry appointed certain persons, being not less than three nor more than nine, being rate-payers of the parish of St. Saviour, to be, and the same became and were, the Burial Board of the parish pursuant to the said statutes : that at a meeting of the vestry of the parish of St. Saviour, duly convened and held, and of *which due notice was given, it was afterwards resolved by the vestry, according to the provisions of the said statutes, that the Burial Board should be authorized to incur expenses to the amount of 2700*l.* in providing and laying out a burial ground under the Burial Acts, and building the necessary chapel or chapels thereon ; and that the Board should be authorized to borrow any money required for the above purposes, and to charge the future poor rates of the said parish with the payment of such money and the interest thereof : that by a certificate under the hands of certain persons being members of the Burial Board, and duly authorized to exercise the powers of the Board, the said persons, on the 28th November, A. D. 1859, certified that the sum of 49*l.* 5*s.* 9*d.* was required for defraying expenses incurred by the Board for the parish of St. Saviour in carrying into execution the said Acts, and directed the overseers of the poor of the parish of Walcot St. Swithin to pay such sum to the clerk to the Burial Board for and on behalf of the Board : that the overseers had levied and collected from the parishioners of the parish of St. Saviour a separate rate, for the pur-

pose of paying the sum of 49*l.* 5*s.* 9*d.*, so certified and directed to be paid, but that the defendants had refused to pay the said sum to the clerk of the Burial Board according to the said certificate, or to make and levy a rate for that purpose. The writ then commanded the defendants to pay, or, if necessary, raise the sum of 49*l.* 5*s.* 9*d.* to pay, to the clerk of the Burial Board for the parish of St. Saviour, according to the certificate of the Board, pursuant to the provisions of stats. 15 & 16 Vict. c. 85, and 20 & 21 Vict. c. 81.

Return. That on a day which had elapsed before the day on which [§574] the meeting of the vestry of the parish of *St. Saviour, convened for the special purpose of determining whether a burial ground should be provided for that parish pursuant to the statutes in that behalf, was holden, to wit, on the 25th January, A. D. 1859, a meeting of the vestry of the original parish of Walcot St. Swithin, duly convened for the special purpose of determining whether a burial ground should be provided, under the statutes in such case made and provided, for the original parish of Walcot St. Swithin, and of which meeting due notice had been given, was holden in and for the original parish; and that at that meeting it was resolved by the vestry of the original parish of Walcot St. Swithin that a burial ground should be provided under the said statutes for the original parish; and the vestry did then and there at the said meeting, after passing the said resolution, appoint nine persons, being ratepayers of the original parish of Walcot St. Swithin, to be the Burial Board of the original parish; and that the Burial Board so appointed continued to be the Burial Board of the original parish thenceforth until and at the time of the holding of the meeting of the vestry of the parish of St. Saviour hereinbefore mentioned, and had so continued from thence hitherto: that before the holding of the meeting of the vestry of the parish of St. Saviour, convened for the special purpose of determining whether a burial ground should be provided for the said parish, pursuant to the statutes in that behalf, a committee of the said vestry had been duly appointed to consider the expediency and best means of providing a burial ground for the parish of St. Saviour; and that at the meeting so convened and holden the written report of the committee was read to the vestry, and that in and by the said report the committee reported [§575] *that they were unanimously of opinion in recommending a separate burial ground for the parish of St. Saviour as almost absolutely necessary, and further strongly recommended the formation of a Burial Board for the said parish; and that, after the report had been so read, it was at the said meeting unanimously resolved by the vestry that the report be adopted, and that a Burial Board for the said parish be at once formed; and that, save as aforesaid, it was not resolved by the vestry at the said meeting that a burial ground should be provided under the statutes in that behalf for the parish of St. Saviour.

Demurrer, and joinder therein.

Petersdorff, Serjt., in support of the demurrer.—First. The vestry of St. Saviour, which has been since 1840 a separate and distinct parish for all ecclesiastical purposes, legally appointed a Burial Board under stat. 20 & 21 Vict. c. 81, s. 5. By that section the Burial Board so appointed has all the powers which they might have had under

the preceding Acts and that Act, if such parish had had a separate burial ground before the passing of stat. 18 & 19 Vict. c. 128; and by sect. 13 of this latter Act, when a District not separately maintaining its own poor, but forming part of a parish maintaining its own poor, shall have a Burial Board, it shall be lawful for such Burial Board "to issue their certificate to the overseers of such parish," "for payment of the sums required for the expenses of such Burial Board." By the proviso in sect. 5 of stat. 20 & 21 Vict. c. 81, "all the powers of any other vestry or meeting and Burial Board, if any, shall then cease and determine, so far as relates to such parish;" which shows that it was intended that an ecclesiastical parish or district should have the power to appoint a Burial Board although there *should be one for the whole parish. [COCKBURN, C. J.—If the construction contended for by the prosecutors is correct, St. Saviour would be for ever exempt from contributing to an expense which had been incurred by its own consent before it had been formed into a separate ecclesiastical parish or district.] The proviso in sect. 5 is not to be construed as extinguishing any powers, either of the vestry or the Burial Board, with respect to expenses incurred antecedently to St. Saviour exercising its right to separate itself from the old parish with regard to burials. In this case the original parish had not incurred any expenses in respect of a burial ground.

Secondly. The resolution for the adoption of the report of the committee of the vestry of St. Saviour was in effect the passing of a resolution that a burial ground should be provided for that parish; divesting it of the words as to the recommendation of the committee, it was a formal resolution, and no person present at the meeting could have misunderstood it. [He referred to stat. 20 & 21 Vict. c. 81, s. 27.]

Montague Smith (with him *Kingdon*), contra.—First. The sub-parish of St. Saviour, having constructively concurred in the appointment of a Burial Board for the whole parish, cannot afterwards appoint a separate Burial Board. All the previous statutes relating to burials are to be construed with stat. 20 & 21 Vict. c. 81. According to the decision in the preceding case, (a) it was competent for the vestry of the original parish to appoint a Burial Board for the whole parish, and upon such appointment the sub-parish became unable to exercise the powers given to them by stat. 20 & 21 Vict. c. 81, s. 5: otherwise there would be two Burial Boards with the power of taxation *in the same district. The proviso in sect. 5, that upon the appointment of a Burial Board for an ecclesiastical parish or district the powers not only of the vestry but of the Burial Board of the original parish shall cease, is unintelligible if construed to operate prospectively; it may perhaps have been intended to apply only to the Burial Boards of private burial grounds. [COCKBURN, C. J.—This is an instance of inartificial legislation; the proviso would more properly be an independent enactment. BLACKBURN, J.—In Viner, appt., *The Churchwardens of Tewbridge, respts.*, 2 E. & E. 9 (E. C. L. R. vol. 102), the Court held that as, under stat. 18 & 19 Vict. c. 128, s. 12, an ecclesiastical parish which has a separate burial ground may appoint a Burial Board for itself, the rest of the parish

(a) See p. 555.

might, by implication, appoint a separate Burial Board under the same section. MELLOR, J.—By sect. 12 of stat. 18 & 19 Vict. c. 128, a parish or district for which a burial ground has been provided may appoint a Burial Board, and yet in that case, construing the proviso to stat. 20 & 21 Vict. c. 81, s. 5, literally, if a smaller district within it subsequently appoints a Burial Board, the powers of the existing Burial Board are to cease.]

Secondly. It does not appear that a valid resolution that a burial ground should be provided for the parish of St. Saviour was passed by the vestry of that parish. [He referred to stat. 15 & 16 Vict. c. 85, s. 10.] [BLACKBURN, J.—At most that is only a defect which seems to be cured by stat. 20 & 21 Vict. c. 81, s. 27; but I have some doubt whether it is a defect. CROMPTON, J.—The return is rather evasive as to this; the report of the committee recommended a separate burial ground and the formation of a Burial Board; after that a *578] resolution by the vestry, that the report be adopted and that a *Burial Board for the parish should be formed, is quite sufficient.]

Petersdorff, Serjt., was not called upon to reply.

COCKBURN, C. J.—This is a case of great doubt, and I do not without great hesitation form an opinion upon it.

The question is whether a parish for ecclesiastical purposes, carved out of a common-law parish, is entitled, under stat. 20 & 21 Vict. c. 81, s. 5, to appoint a Burial Board for itself, in order to the obtaining of a separate burial ground, there being already a Burial Board established for the entire parish, of which it is a component part. Section 5, in terms, gives power to such a part of a parish to appoint its own Burial Board and establish its own burial ground; and provides that, on its taking the necessary steps for that purpose, all the powers of the general vestry of the entire parish, and of the Burial Board already constituted, shall at once cease and determine so far as relates to it.

If that section stood alone, nothing could be clearer. But a difficulty arises in giving a construction to that section according to its plain meaning, consistently with the enactments in other statutes which are to be read with it. The great difficulty is that, under powers given by the previous Acts, the vestry of the entire parish are entitled to appoint a Burial Board and establish a burial ground for the entire parish, and such Burial Board is empowered to borrow money for the purposes of the burial ground, and to charge the rates of the entire parish with the payment of principal and interest. They are to apportion the charge over the component parts, if each part maintains its own poor and has its own poor rate; but, if not, as *579] in the *present case, they are to issue their certificates to the overseers to levy out of the general poor rates the whole amount required. But if, after a general Burial Board has been appointed, and a common burial ground has been obtained for a whole parish, a District parish may proceed, under the 5th section, to appoint a Burial Board and establish a separate burial ground of its own, there is great difficulty, though the solution of it is not necessary to the decision of this case, in saying how the powers of the vestry of the whole parish

are to be kept alive, so as to enable that body to compel the District parish to contribute its share towards the common liability which has been already incurred and charged upon the rates of the whole parish. The enactment is express that, on the exercise by the District parish of the powers given to it by that section, the powers of the general Burial Board are at once to cease as to the District parish, and therefore the power of granting certificates to the overseers is at an end; and there is no other mode of making the District parish contribute. On the other hand, when we look to that part of the proviso in the same section, which, until a burial ground shall be provided for the new parish or District, with respect to the burial of parishioners of such new parish or District in the burial ground provided under previous Acts for the whole parish out of rates to which the new parish or District shall contribute or be liable, confers upon the incumbent of the new parish or District the same rights, duties, and fees as if that burial ground were exclusively the burial ground of such new parish or District, it seems plain that the Legislature did contemplate that a District burial ground *might be superadded to that already [*580 provided for the whole parish. When it becomes necessary to decide that question, it may probably be held that the powers of the general Board, though superseded with respect to the new parish or District for the future, are yet kept alive with reference to expenses and liabilities already incurred. It is sufficient to have suggested this as a difficulty in considering what is the proper construction to be put on the 5th section.

With reference to the facts of the present case, and in the midst of this complicated, confused, and embrangled legislation the only safe course, being to adhere and give effect to the plain meaning of the terms used, I come to the conclusion that, although a Burial Board may have been appointed and a burial ground established for the whole parish, that does not supersede the power of the District parish, under stat. 20 & 21 Vict. c. 81, s. 5, to appoint a Burial Board and provide a separate burial ground for itself. Upon this view our judgment on this mandamus and return must be for the Crown.

CROMPTON, J.—We have to consider the effect of stat. 20 & 21 Vict. c. 81, s. 5, where a Burial Board has been appointed by a smaller ecclesiastical parish or district, after the appointment of a Burial Board for the whole parish. In the preceding case(a) I expressed myself as feeling difficulties as to the construction of that section; and I am not able now to solve the difficulty as to the right of creditors.

We have to see whether the prosecutors of this mandamus have brought themselves within that section, or *whether there is [*581 anything in the return to take them out of it. Upon the whole I think that, on this record, the prosecutors are within sect. 5. We ought to keep as near to the words of the statute as we can. It appears from the writ that St. Saviour is a new parish for ecclesiastical purposes, not separately maintaining its own poor, and that it had no separate burial ground; and therefore it is not within stat. 18 & 19 Vict. c. 128, ss. 12 & 13. But is it not within stat. 20 & 21 Vict. c. 81, s. 5? By that section the vestry of a new parish, not separately

(a) See p. 556.

maintaining its own poor, and which has no separate burial ground, may appoint a Burial Board with all the powers of a Burial Board for the whole parish under previous Acts, and among others the power of issuing certificates to the overseers of the parish for taxing that part of the parish which has come to the resolution of providing a separate burial ground; and there is a proviso that then all the powers of the vestry and of the Burial Board for the whole parish shall cease as to the new ecclesiastical parish. But for that proviso, there would be much in Mr. Smith's argument that when a Burial Board has been appointed for the whole parish, including one or more parishes for ecclesiastical purposes, those parishes would not have the power to appoint a separate Burial Board; just as when one of two sets of magistrates, having concurrent jurisdiction, gets seisin of a matter the other is *functus officio*,—though that is not exactly a parallel case, because the two bodies in the present case are not to do precisely the same thing. I should have doubted whether, in order to get rid of the difficulty, we might not have strained the language of the proviso in sect. 5, as introduced *per incuriam*, or, for greater caution, to guard *582] *against any thing whether possible or impossible; but, in the subsequent part of the proviso, the framers of the Act distinctly contemplate the case of a smaller ecclesiastical parish appointing a separate Burial Board, where a burial ground has been already provided for the whole parish, because it says, "If any burial ground has been or shall be provided under the recited Acts for the burial of the dead, or any or either of them, for any parish or parishes out of rates to which such new parish or district, or any part thereof, shall have contributed or contribute or be liable." If the smaller ecclesiastical parish is in a large parish, it may be convenient for its inhabitants to have their own burial ground.

The possible solution of the difficulty, where a liability has been previously thrown on the whole parish, may be that the proviso restrains the Burial Board of the whole parish from doing any act to lay any fresh burden upon the new ecclesiastical parish, but that their powers to carry out what has been already begun, and as to liabilities already incurred, continue in force. Unless the Courts hold that existing liabilities remain and cannot be got rid of, and that the powers of the Burial Board of the whole parish quoad those liabilities remain also, the Legislature must interfere. However that may be, the Legislature appear to have given the smaller part of the parish, which has been constituted an ecclesiastical parish, power to provide a separated burial ground, and to tax themselves for that purpose.

BLACKBURN, J.—The difficulty in the present case arises from the necessity of construing these statutes together. The proviso in sect. 5 of stat. 20 & 21 Vict. c. 81, appears to have been framed without *583] reflecting *on all the matters to which it would apply; but we must construe it as if the Legislature had in its mind all the previous enactments. By the earlier statutes the whole parish was empowered to appoint a Burial Board without any limitation; subsequently, smaller parishes or districts within the whole parish were enabled to do the same. And, by stat. 20 & 21 Vict. c. 85, s. 5, when the smaller parish has appointed a Burial Board, it "shall exercise and have all the powers which they might have exercised and had"

under the former Acts. If both the original and the district parish choose to appoint a Burial Board, it is not said in terms that the exercise of its powers by the one shall take away the powers of the other. I agree with Mr. Smith that we cannot suppose that the Legislature meant that there should be two concurrent Burial Boards exercising the same powers at the same time in the same district; nor that there should be a race between them, and that the parish which first appointed a Burial Board should preclude the other from appointing one. I think the proviso was introduced to prevent that absurdity; because it provides that, upon the appointment of a Burial Board for the new parish, "all the powers of any other vestry or meeting or Burial Board, if any, shall then cease and determine," so far as relates to such new parish. And what follows in the same proviso shows that the Legislature contemplated the case might arise in which the whole parish had previously appointed a Burial Board, and that Board had proceeded to provide a burial ground. Therefore the Court is bound to come to the conclusion that the smaller ecclesiastical parish may appoint a Burial Board and provide a separate burial ground; and, when they do so, the powers of the Burial Board of the whole parish shall cease as to the smaller ecclesiastical parish. And this would be just and proper, if a clause had [*584 been inserted that the rights of creditors should be preserved. I think it is probable that the proviso will be construed as if the words "except so far as is necessary to discharge existing liabilities" were in it, though that would be a considerable strain upon the words.

MELLOR, J.—I share in the doubts and hesitation expressed by the Lord Chief Justice and the other members of the Court: and I should have wished for further time to consider the matter if I did not believe that we have obtained all the aid which we can expect. I was at first struck with Mr. Smith's view that the smaller parish cannot appoint a separate Burial Board when the whole parish has appointed a Burial Board and obtained a burial ground; but upon consideration I am not able to adopt it, and therefore I agree with the rest of the Court.

I also agree, as to the construction of stat. 20 & 21 Vict. c. 81, s. 5, that it will probably be held that the new ecclesiastical parish shall remain liable to rates for the charges which have been already incurred, and that the effect of the proviso for the cesser of the powers of the Burial Board of the whole parish will be to restrain the further exercise of their powers to lay any fresh burden upon the new ecclesiastical parish. I hope that a subordinate sense will satisfy the words of the proviso; and, at all events, that the result will be not to damage the security of the rates in respect of liabilities already incurred.

Judgment for the Crown.

*585] *The QUEEN v. HAYWARD. April 30.

5 & 6 W. 4, c. 76, s. 105.—*Municipal corporation.—Clerk of the peace.—Removal.*

By The Municipal Corporation Act, 5 & 6 W. 4, c. 76, s. 103, where a borough has a separate Court of Quarter Sessions, the power of appointing the clerk of the peace is in the Council of the borough; and, by sect. 105, the Court of Quarter Sessions, of which the Recorder is sole Judge, "shall have cognisance of all crimes, offences, and matters whatsoever cognisable by any Court of Quarter Sessions of the peace for counties;" provided, among other things, that no Recorder, by virtue of his office, shall have power "to exercise any of the powers herein specially vested in the Council." Held, that the power of removing the clerk of the peace was in the Recorder.

INFORMATION in the nature of a quo warranto for usurping the office of clerk of the peace of the city of Rochester.

Plea. That the city of Rochester is an ancient city, and is one of the boroughs mentioned and referred to in Schedule A. in stat. 5 & 6 W. 4, c. 76, as the borough of Rochester; and that the mayor and citizens of the said city and the said corporation are one body corporate and politic, by the name of Mayor, Aldermen and Citizens of the city of Rochester, and that in the said city, pursuant to the provisions of the said Act, there of right ought to have been one mayor and divers aldermen and councillors of the said city: and that, under and by virtue of the said Act of Parliament, a separate Court of Quarter Sessions of the Peace had been holden in and for the said city, and there of right ought to be a Recorder of and for the said city: and that there of right ought to have been, under the said Act of Parliament, a fit person to be clerk of the peace of the said city during his good behaviour; and that the place and office of *clerk of the peace *586] of the said city was a public office and a place and office of great trust within the said city touching the administration of public justice within the same: that after the passing of the said Act of Parliament, and after the mayor, aldermen and councillors of the said city had been duly elected pursuant to the provisions of the said Act of Parliament, and after the said separate Court of Quarter Sessions of the Peace had been granted pursuant to the provisions of the said Act of Parliament, to be holden in and for the said city, and after the Recorder of and for the said city had been appointed pursuant to the provisions of the said Act, to wit, on, &c., the mayor, aldermen and councillors of the said city for the time being, then being the Council of the said city, duly, and according to the provisions of the said Act of Parliament, appointed the defendant, then being a fit person in that behalf, to be clerk of the peace of the said city during his good behaviour, and the defendant then and there accepted the office of the clerk of the peace of the said city, and then and there became and was the clerk of the peace for the said city. Averment, that by virtue thereof he claimed the office. Verification.

Replication. That, after the defendant was appointed clerk of the peace of the said city, he grossly misbehaved himself, in that he, being a trustee of certain moneys for certain persons, did, with intent to defraud them, convert and appropriate certain part of the said moneys to and for his own use, without their consent or knowledge: and thereupon afterwards, and before his removal from his office as thereafter mentioned, a bill in Chancery was preferred by one G. E.,

alleging that the defendant had embezzled part of the said trust moneys by sales of *stock which came into his hands as surviving trustee thereof, and praying that a certain partnership between him and the defendant might be declared to be dissolved; and thereupon the defendant put in his answer, and stated that he had sold part of the said stock, and received the proceeds thereof, and applied the same to his own use; and the Court decreed that the said partnership was dissolved: and afterwards, and before the removal of the defendant from his office, it became and was publicly known and notorious in the said city that the defendant had so misbehaved himself: and thereupon the Council of the said city summoned the defendant to appear before them to show cause why he should not, on account of such misbehaviour, be removed from his office; but the defendant did not appear or answer the charge: and the Council resolved that, on account of such misbehaviour, the defendant be removed from the said office, and the Council did accordingly remove him; and afterwards, duly and according to the provisions of the said Act of Parliament, appointed H. Wickham, then being a fit person, to be clerk of the peace of the said city during his good behaviour, who accepted the said office.

Demurrer, and joinder therein.

Mellish (with him *Macnamara*), for the defendant.—First. The power to remove the clerk of the peace of a borough having a Court of Quarter Sessions is in the Recorder; and the Town Council have no jurisdiction to remove him.

Although under the Municipal Corporation Act, 5 & 6 W. 4, c. 76, s. 103, the clerk of the peace for such a borough is appointed by the Town Council, he is not a corporate officer. Before that statute the *offices of town clerk and clerk of the peace in boroughs were, [*588] in most cases, by the terms of the charters, united in the same person. But *Regina v. The Recorder of Carmarthen*, 7 A. & E. 756 (E. C. L. R. vol. 84), where it was held that notice of appeal against a borough rate, under stat. 5 & 6 W. 4, c. 76, s. 92, must be given to the town clerk, and need not be given to the clerk of the peace, shows that, since that statute, the clerk of the peace is an officer of the Court of Quarter Sessions. Lord Denman said, p. 759: "The Act which creates the clerk of the peace imposes upon him no duties to the Town Council." And Littledale, J., said, p. 760: "Stat. 5 & 6 W. 4, c. 76, s. 92, puts the borough rate on the footing of a county rate; we are, therefore, to see what is adapted to the circumstances of each case. In that of a county rate, the officer of the party making the rate is the clerk of the peace; in that of a borough rate, it is the town clerk. It is true that stat. 57 G. 3, c. 94, s. 2, names the clerk of the peace; but, under The Municipal Corporation Act, the clerk of the peace of a borough does not act as the clerk of the peace of a county does." [BLACKBURN, J.—Does it follow that he is not a corporate officer, so as to bring him under the power of the Town Council?] In *Regina v. Grimshaw*, 5 D. & L. 249, where the question was, whether the relator in a quo warranto for executing the office of coroner of the borough of Wigan, in which judgment had been given for the Crown, (a) was entitled to costs, Patteson, J., held that, since The Municipal Cor-

(a) See 10 Q. B. 747 (E. C. L. R. vol. 59).

poration Act, the coroner was not a corporate officer within the meaning of stat. 9 Ann. c. 20, and said, pp. 261-262: "He is the Queen's officer, his duties are entirely independent of the corporation, *589] and although *he is appointed by the corporation, it does not make him their officer." Those observations apply to the clerk of the peace, who also is a new officer in boroughs. The rule of law is that officers of a Court are responsible to the Court of which they are officers, not to the persons who appointed them. The officer of a Court of record is removable by the Court whether he was appointed by the Court or not: thus the clerk of assize is appointed by the senior Judge for that circuit at the time of the vacancy, but he is removable by any Judge of assize. [CROMPTON, J.—That is, by the Judge who is in the same position as the person who appointed him.] In 6 Bac. Abr. 43, 7th ed., *Offices and Officers* (M.), it is said: "If the King grants an office in any of the Courts at Westminster the Judges may remove such an officer for insufficiency, and are the proper persons to judge of his abilities; 4 Mod. 30, arguendo;" which was the case of *Jones v. The Bishop of Llandaff*. And then the case of *Vaux v. Jefferson*, 2 Dy. 114 b, 2 Roll. Abr. 155 (O), pl. 4, is cited, in which a filazer of the Common Pleas was discharged from his office for being absent during two years, and for farming his office from year to year without leave of the Court. [CROMPTON, J.—In *Rex v. The Corporation of Wells*, 4 Burr. 1999, which was a mandamus to restore Serjeant Burland to the recordership from which the corporation had removed him, the Court thought that the corporation had power to remove him if there had been misconduct justifying his removal. BLACKBURN, J., referred to *Regina v. The Corporation of Ipswich*, 2 Ld. Raym. 1233: and MELLOR, J., referred to *Rex v. The Mayor of Bridgewater*, 6 A. & E. 339 (E. C. L. R. vol. 33).] The clerk of the peace of *590] *a county is removable by the Quarter Sessions of the county: *Harcourt v. Fox*, 4 Mod. 167, 1 Show. 426, 556, 12 Mod. 42; (a) *Rex v. Lloyd*, 2 Str. 996. A coroner, indeed, is removable by the Lord Chancellor; but there is a special reason for that.

The office of clerk of the peace in a borough is a new office created by statute, and the question is, on a proper construction of the statute creating the office, in whom is the power of removal vested, no express power to remove being given. By sect. 103 of stat. 5 & 6 W. 4, c. 76, after the grant of a separate Court of Quarter Sessions, the Town Council is to appoint "a fit person to be clerk of the peace during his good behaviour:" and, in the event of his being accused of misconduct, it is important that he should be tried by a tribunal which has power to call witnesses and examine them on oath and send for papers, and whose determination may be removed into this Court by certiorari. By sect. 105 all the judicial powers incident to the county Quarter Sessions are given to the Recorders of boroughs, and therefore the power of removing the clerk of the peace: and the proviso, which excepts the power of making a county rate, and to grant licenses, "or to exercise any of the powers herein specially vested in the Council of such borough," shows how general the power of the Recorder is. Clerks of the peace of boroughs are put in the same position, in all respects, as clerks of the peace for counties. Then

stat. 1 W. & M. sess. 1, c. 21, s. 6, which provides for the suspension or discharge of the latter, having given to the Quarter Sessions of the county jurisdiction to determine the matter judicially, it follows that the power of removing the clerk *of the peace in boroughs [*591 cannot be a power specially vested in the Town Council within the exception in the proviso to sect. 105. The cases decided on sect. 105 of stat. 5 & 6 W. 4, c. 76, as to the power of the Recorder to try appeals against orders of removal show that he has every jurisdiction which the Quarter Sessions in counties have, unless it is expressly taken from him by the proviso: *Regina v. The Inhabitants of St. Edmunds, Salisbury*, 2 Q. B. 72 (E. C. L. R. vol. 42); *Regina v. The Justices of Suffolk*, 2 Q. B. 85; *Regina v. The Justices of Shropshire*, 2 Q. B. 87. [He also cited *Regina v. The Recorder of Hull*, 8 A. & E. 638 (E. C. L. R. vol. 35).]

Secondly. The defendant had not committed an offence of such a nature that he could be lawfully removed. [The Court intimated that they would decide the first point before hearing the argument on the second.]

Lush (with him *Prentice*), for the prosecutors.—First. The clerk of the peace in boroughs is not an officer of the Court of Quarter Sessions; his position differs from that of a clerk of the peace in counties, though the duties are similar: *Harding v. Pollock*, 6 Bing. 25 (E. C. L. R. vol. 19). In the county the clerk of the peace is deputy of the custos rotulorum who was appointed by the Crown, and therefore he was removable by the custos rotulorum: *Dickenson's Quarter Sessions*, by Talfourd, p. 64, 5th ed. [BLACKBURN, J.—Stat. 37 H. 8, c. 1, treats the clerk of the peace as a distinct officer, and not as the deputy of the custos rotulorum. Sect. 3 enacts that every custos rotulorum shall "nominate, elect, appoint, and assign all and every person and persons which hereafter shall be clerks of the peace . . . and to give and grant *the said office and offices [*592 of the clerkship of the peace to such able person instructed in the laws of this realm, as shall be able to exercise and occupy the same, to hold and enjoy the same during the time that the said custos rotulorum shall occupy and exercise the aforesaid office of custos rotulorum, so that the said clerk demean him in the said office justly and honestly: And that it shall be lawful to every such grantee of the said clerkship, to occupy and enjoy the same office of the clerkship of the peace, by himself, or by his sufficient deputy instructed in the laws of this realm, so that the same deputy be admitted, taken, and reputed by the said custos rotulorum, to be sufficient and able to exercise, occupy, keep, and enjoy the same office." *Mellish* referred to the judgment of Holt, C. J., in *Harcourt v. Fox*, 1 Show. 529, 530.] Stat. 37 H. 8, c. 1, only alters the tenure of the office. [He referred to *Dickenson's Quarter Sessions*, by Talfourd, p. 96, 5th ed.] By stat. 1 W. & M. sess. 1, c. 21, s. 5, "the custos rotulorum, or other person, to whom of right it doth or shall belong to nominate or appoint the clerk of the peace for any county, riding, division, or other place, shall, from time to time, where the office of the clerk of the peace now is, or hereafter shall be void, nominate and appoint one able and sufficient person residing in the said county, riding, division, or other place, for which he is so appointed or to be appointed clerk

of the peace, to execute the same by himself or his sufficient deputy, and to take and receive the fees, profits, and perquisites thereof, for so long time only as such clerk of the peace shall well demean himself in his said office." Sect. 6, which gives the power of removing [593] the clerk of the peace to the justices in "Quarter Sessions, does not take it away from the custos rotulorum: the Quarter Sessions have that power concurrently with him. At any rate that statute does not apply to boroughs: the words "other person," in sect. 5, had reference to the counties palatine of Durham and Lancaster. [COCKBURN, C. J.—It is admitted that stat. 1 W. & M. sess. 1, c. 21, does not embrace this case.]

It is a general principle that officers holding office during good behaviour are, in the absence of any prescription, custom or enactment to the contrary, removable by the person in whom the appointment is vested: e. g. "The parish clerk ought to be deprived by him that placed him in his office;" subject to his decision being brought before a superior Court for revision: 3 Burn. Eccl. Law, by Phillimore, p. 86, 9th ed. Therefore the proviso at the end of sect. 105 of stat. 5 & 6 W. 4, c. 76, excludes from the jurisdiction of the Recorder the power of removing the clerk of the peace.

Neither is the power of removing its officers incident to the Court of Quarter Sessions as a Court of Record: if it were so, stat. 1 W. & M. sess. 1, c. 21, s. 6, would have been unnecessary. The Legislature, by giving the power of appointing the clerk of the peace to the Town Council, give them also the power of removing him. They have an interest in the good conduct of their officer, and they pay his salary. [COCKBURN, C. J.—The question is whether sect. 105 of The Municipal Corporation Act has not conferred this power on the Recorder as one of the matters over which the Court of Quarter Sessions in counties has jurisdiction.] It appears from the provisions of that Act relating to the clerk of the peace, that a clerk of the peace in boroughs is in a different position from the clerk of the peace in counties. [COCKBURN, C. J.—The clerk of the peace in boroughs is [594] not an "officer of the Town Council: he has no corporate functions to perform.] The corporation must keep the records by deputy, as the custos rotulorum is required to do, and therefore the clerk of the peace is their officer. By stat. 5 & 6 W. 4, c. 76, all patronage, except the appointment of the Recorder, is studiously left in the Town Council. In Dickinson's Quarter Sessions, by Talfourd, p. 90, 5th ed., "*Of the Clerk of the Peace*," it is said: "In cities and towns corporate there was usually an analogous officer, who performed correspondent duties, under some other title, as that of 'town clerk,' and was generally appointed, not by the custos rotulorum, but by the body corporate of which he was an officer;" so that this is not a new office. Sect. 103 only intended to compel the Council after a grant of a separate Court of Quarter Sessions to appoint a person to act as clerk of the peace at the Quarter Sessions; and therefore, as the town clerk was removable by the corporate body who appointed him, the clerk of the peace is so also. By sect. 65, they had a general power of removing the officers who were in office at the time of the first election of councillors under that Act; and the effect of the proviso in that section, that the town clerk should have the custody of the

charters, deeds, muniments and records of the borough, is to divide the offices of town clerk and clerk of the peace. Sect. 124 requires the Council to settle a table of the fees which the clerk of the peace is to take, and so gives them jurisdiction over him. [CROMPTON, J.—Subject to confirmation and allowance by one of the Secretaries of State.] By that section the Town Council are to do in boroughs what, by stat. 11 & 12 Vict. c. 43, s. 80, the county justices do in counties. Sect. 124 also confers the power of altering the fees on the Council, and not on the *Recorder. [CROMPTON, J.—By that [*595 section the Council are also to settle the fees to be taken by the clerk to the justices, with which the Recorder has nothing to do; and it would not be a wise arrangement to have two tables of fees, one made by the Recorder for the clerk of the peace, and the other made by the Council for the clerk to the justices.] This is further carried out by stat. 14 & 15 Vict. c. 55, s. 9, which authorizes the Quarter Sessions in counties, and the Council in boroughs, to commute the fees and fix what salary shall be paid to clerks of the peace and clerks to justices in lieu of fees. [CROMPTON, J.—Is not every judicial duty taken away from the Town Council? COCKBURN, C. J.—If there was any matter of which the Quarter Sessions were bound to take judicial cognisance prior to the passing of stat. 5 & 6 W. 4, c. 76, the jurisdiction over the same matter is vested in the Recorder. Is not cognisance of the misbehaviour of a clerk of the peace a judicial matter? MELLOR, J., referred to *Regina v. The Lords of the Treasury, Re Tibbits*, 10 A. & E. 374 (E. C. L. R. vol. 37).] It is exercised out of Court. *Regina v. The Recorder of Hull*, 8 A. & E. 638 (E. C. L. R. vol. 35), was decided on peculiar grounds.

Secondly. The replication shows sufficient ground for the removal: and quo warranto is the legal mode for trying the question whether the defendant is removable. [BLACKBURN, J.—It cannot be contended that the office was *ipso facto* vacated.]

Mellish was not called upon to reply.

COCKBURN, C. J.—I am of opinion that upon this demurrer our judgment ought to be in favour of the defendant.

*The Town Council have taken upon themselves to exercise [*596 the power of removing an officer, when, in point of law, that power was not vested in them. I do not entertain any reasonable doubt that, in boroughs having a Court of Quarter Sessions, the clerk of the peace is appointed solely by virtue of stat. 5 & 6 W. 4, c. 76, and that the office must be considered as a new office created by that statute with reference to such boroughs. The same statute, by sect. 105, enacts that all the judicial functions exercised by Courts of Quarter Sessions in counties shall, with special exceptions, be exercised by the recorders of such boroughs: the words are, "such Court of Quarter Sessions of the Peace shall be a Court of record, and shall have cognisance of all crimes, offences and matters whatsoever cognisable by any Court of Quarter Sessions of the Peace for counties," and the exceptions are then specified. Now, as the clerk of the peace of a borough is to hold his office during good behaviour in that office, if he misbehaves himself the question arises whether the misbehaviour, as a ground of removal from the office, is a matter cognisable by the Recorder. That depends entirely on whether, in counties,

misbehaviour of the clerk of the peace is cognisable by the Court of Quarter Sessions. When we look at stat. 1 W. & M. sess. 1, c. 21, we find that, by sect. 6, the misbehaviour of the clerk of the peace in a county, and his removal from his office, is a matter which is brought within the jurisdiction of the Court of Quarter Sessions upon complaint properly instituted. It was said by Mr. Lush that that enactment only gives to the Quarter Sessions a concurrent jurisdiction in this matter with the person appointing the clerk of the peace, who, in the case of a county, is the *custos rotulorum*. But I think that, [597] when the Legislature gives a jurisdiction of *this kind to a particular tribunal, and points out the form of procedure to be adopted for the adjudication of such a question, all other jurisdiction must, by implication, be taken away; and therefore the Court of Quarter Sessions of a county would have the sole cognisance of such a matter. If that be so, this would be a matter cognisable by the Court of Quarter Sessions of the county by virtue of stat. 1 W. & M. sess. 1, c. 21; and, as the Recorder in a borough is to have jurisdiction over all matters cognisable by the Courts of Quarter Sessions in counties, he has jurisdiction over this.

Mr. Lush endeavoured to show that this was not a matter coming within the sphere of judicial functions, but rather within the sphere of those administrative functions which justices in the Court of Quarter Sessions exercise independently of judicial forms; and that, therefore, the inference ought to be drawn that the Legislature intended to leave it to the common Council of the borough, instead of submitting it to the jurisdiction of the Recorder. I cannot think so: for nothing would be more inconvenient than that the question of misbehaviour in office of an officer of a Court of justice, instead of being cognisable by those who exercise judicial power and authority in the Court, should be left to the fluctuating and uncertain decision of a popular assembly.

Mr. Lush also argued that, as the power of removal on the ground of misbehaviour is necessarily incident to the power of appointment, and the power of appointing the clerk of the peace is specially given to the Town Council, the power of removing him must, as incidental to it, be in them. I do not see that. I agree with Mr. Lush that, at common law, in the majority of offices held on condition of good behaviour, the power of removal is in the person having the power of appointment. But *if the Legislature have taken away the [598] power of removal, as they have done in this instance of the clerk of the peace of counties, and have given it to the Court of Quarter Sessions; and a subsequent statute enacts that clerks of the peace shall be appointed for boroughs, and that the judge of the borough Quarter Sessions, namely the Recorder, shall have cognisance of all matters cognisable by the Court of Quarter Sessions for the county, and therefore of misbehaviour of this newly created officer; it seems to me that the proviso at the end of sect. 105 of stat. 5 & 6 W. 4, c. 76, that the Recorder shall not exercise any of the powers specially vested in the Council, must be considered as excepting the power of removing such an officer; and therefore there is no weight in the argument for the prosecutors founded upon that proviso.

Upon the whole, therefore, I put the case thus: the Recorder of a borough has given to him by Act of Parliament cognisance of all

matters cognisable by a Court of Quarter Sessions in a county : that is, his judicial authority is co-extensive with theirs. This is a matter which would come within the judicial authority and cognisance of the Court of Quarter Sessions of a county ; whence it follows, *ex necessitate*, that the same power and authority is vested in the Recorder of a borough ; and, if that authority and jurisdiction is vested in the Recorder, it is taken away from those who otherwise would have power to inquire into misbehaviour as a cause of removal : consequently, the Town Council of the borough have lost the power, as in counties the *custos rotulorum* lost it by that function being, by Act of Parliament, vested in another tribunal, namely the Quarter Sessions.

CROMPTON, J.—I am of the same opinion, upon the *ground that this case comes within sect. 105 of stat. 5 & 6 W. 4, c. 78. [*599] The policy of that act was to take away from a body like the Town Council jurisdiction over all matters of judicial proceeding, and to give it to the Recorder of the borough. And the words are large enough to embrace every thing in the nature of trial or judicial proceeding.

In the case of a clerk of the peace of a county, the Court of Quarter Sessions for the county alone have the function of discharging their own officer. That was given to them distinctly by stat. 1 W. & M. sess. 1, c. 21, s. 6, and in such a way as to take it from the *custos rotulorum*, who had it before. Mr. Lush said that there might be a concurrent jurisdiction, and that the person first seised of the jurisdiction so to speak, that is the person who first exercised it, would exclude the other. That would be a very far-fetched and impracticable construction to put on the enactment. The Legislature could not have meant that the Quarter Sessions were to have the power if the *custos rotulorum* did not exercise it. The statute clearly takes it from the *custos rotulorum* and gives it to the Quarter Sessions.

In construing the 105th section of stat. 5 & 6 W. 4, c. 50, we must look, not at what jurisdiction the borough justices or the borough Sessions had before the passing of that statute, but at what jurisdiction the Quarter Sessions for the county had before. As to the clerk of the peace, they had clearly the function of discharging their own officer. I will not enter into considerations of convenience, though they are strong in favour of the construction which we adopt. By stat. 1 W. & M. sess. 1, c. 21, s. 6, the Quarter Sessions for the county have *vested in them, as a Court exercising judicial functions, the sole and exclusive power of dismissing their own officer—the mode of procedure, the charge, and almost the pleading being given : and they are to decide on the alleged misdemeanour of the party, and give their judgment accordingly. [*600]

Then let us see whether there is anything to prevent that function being vested in the Recorder of a borough. It was not in the Town Council originally, because I think the office of clerk of the peace in boroughs is a new office. In many boroughs there was no such office distinct from that of town clerk ; and, at all events the Council of every borough in which a separate Court of Quarter Sessions is granted have now not only the power, but by sect. 103 it is compulsory on them, to appoint a clerk of the peace. Then the question arises whether the function of discharging that officer does not vest in the Re-

corder under the 105th section. The words of the enactment are as general as possible, for the Recorder is to hold a Court of Quarter Sessions, which is to be a Court of record, and to "have cognisance of all crimes, offences, and matters whatsoever cognisable by any Court of Quarter Sessions of the peace for counties." The power to try appeals against orders of borough justices was a new power given by this enactment. And I do not agree with Mr. Lush that it is necessarily confined to judicial proceedings. The inquiry whether there has been a proper appointment of inspector of weights and measures is hardly a judicial proceeding; yet this Court has held that to be a matter within sect. 105.(a) I think the Courts have rightly given a wide construction to the section. Moreover, the *exception in *601] the proviso seems to me, in the first part of it, to enlarge rather than to control the enacting part:—"No Recorder, by virtue of his office, shall have power to make or levy any county rate, or rate in the nature of county rate, or to grant any license or authority to any person to keep an inn, alehouse, or victualling house, to sell excisable liquors by retail,"—those are hardly matters of a judicial nature,—"or to exercise any of the powers therein specially vested in the Council of such borough." The only doubt is on these last words; but I do not think that this is a power specially vested in the Council of a borough. By sect. 103 the power of appointing to the office, which is to be held during good behaviour,—a power not in the nature of a judicial proceeding,—is expressly vested in the Council, but nothing is said, and I think purposely, about the power of dismissing. And when we look at the analogous case of the clerk of the peace for counties, we see that the power of dismissal is not necessarily included in the power of appointment. Whether in general the giving a power of appointment gives also by implication a power of dismissal, it is not necessary to decide; but it is too much to say that, because in some cases the person who appoints has the power of dismissal, the latter power is necessarily involved in the former.

I think, as Mr. Mellish said, the clerk of the peace in boroughs is to be appointed under the 108d section, by analogy to the office of clerk of the peace of a county, to perform the duties formerly performed by the town clerk; and the power of dismissal is not so necessarily involved in the power of appointment that it can be said to be "specially vested" in the Council: for the following reasons, *602] firstly, because the Legislature do not say by *whom the dismissal is to be; secondly, because they make the office and the powers belonging to it analogous to those of the clerk of the peace in counties; and, principally, because in the case of the county the power of dismissing from the office is not in the person who has the power of appointment. I think this office is exactly analogous to that of the clerk of the peace in a county, because the Town Council, as Mr. Lush said, has the care of the rolls, as the custos rotulorum in the county has; so that the Council represents the person having the power of appointment, but not the power of dismissal. This function comes within the 105th section and therefore the defendant is entitled to our judgment.

(a) See Reg. v. The Recorder of Hull, 8 A. & E. 638 (E. C. L. R. vol. 35).

BLACKBURN, J.—Several points have been spoken to during the argument, upon which we need not come to any decision.

Before the passing of stat. 5 & 6 W. 4, c. 76, the office of clerk of the peace in counties, and divisions, and places analogous to counties, was regulated by stat. 1 W. & M. sess. 1, c. 21. There was no such office in boroughs. Whether they had Quarter Sessions or not the functions which were performed by the clerk of the peace in counties were performed in boroughs by some person, but no distinct officer for the performance of them existed. That being so, stat. 5 & 6 W. 4, c. 76, s. 103, expressly enacted that, after the Court of Quarter Sessions had been created, "the Council of every such borough shall appoint a fit person to be clerk of the peace during his good behaviour." That is the creation of a new office the appointment of which is given to the Town Council.

Generally, the head of the Corporation, or the head of *the Court, who has a great interest in keeping the officers of the Corporation or of the Court in order, would be the proper person to have the power of appointment; and would be the proper person to consider whether there was ground for amotion from the office. Therefore, wherever at common law or by ancient custom there is a person having the power of appointment, he would also have the power of amotion. But, as at present advised, I do not think that, where a power of appointment to an office is given by statute, that incidentally gives also the jurisdiction and power to inquire whether the officer has misconducted himself, so that in case of misconduct he should be removed. I do not, however, wish to express a decided opinion upon this point.

But, when we look at sect. 103 of stat. 5 & 6 W. 4, c. 76, by which the power of appointing the clerk of the peace is given to the Town Council, and nothing more is said about it, I think the true construction of the statute is, as pointed out by my brother Crompton, that the Town Council appoint a new officer—the clerk of the peace, subject to all the incidents which belong to the office of clerk of the peace of the county. Whatever may have been the power of the custos rotulorum before stat. 1 W. & M. sess. 1, c. 21, s. 5, made the office of clerk of the peace an office held during good behaviour, that is, for life unless removed for misbehaviour, and by sect. 8, gave the power of amotion to the Quarter Sessions for the county, I think it is plain that by that statute the power of amotion, and of inquiring whether the clerk of the peace should be removed or not, was exclusively given to the Court of Quarter Sessions for the county. Therefore, *when this new office was created in boroughs, the power of amotion, as incidental to it, is given to, and the power of inquiry is to be before, the Quarter Sessions. There cannot be a more judicial act than this; and by sect. 105 of stat. 5 & 6 W. 4, c. 76, all matters which would be judicially considered in the Court of Quarter Sessions of the county are to be judicially considered by the Recorder sitting as the Court of Quarter Sessions for the borough.

I am therefore of opinion that, on the construction of the statute, the clerk of the peace for a borough, when he has done anything for which he may be removed, is to be removed by the Recorder, in his judicial character, upon inquiry into the case. Upon that ground.

without entering into the question whether there were grounds to justify the removal, I hold that the removal of the defendant by the Town Council goes for nothing, and therefore the defendant is entitled to our judgment.

MELLOR, J.—I come to the conclusion that the construction which has been put upon the 105th section of stat. 5 & 6 W. 4, c. 76, by my Lord and my learned brothers is correct. I think this was a matter cognisable by the Court of Quarter Sessions for counties, and I think that by stat. 5 & 6 W. 4, c. 76, s. 105, the same authority and power is as extensively conferred upon the Recorder,—he being the sole Judge of the Quarter Sessions in boroughs. And the proviso makes it clear. The appointment of clerk of the peace for boroughs is vested in the Town Council, and his removal was supposed by the Legislature to be provided for by the enactment which existed with [reference to clerks of the peace in counties; *so that it was considered unnecessary to make any special provision with reference to it in The Municipal Corporation Act.]

All the arguments from convenience concur in support of that construction; and I should be unwilling to agree in any other unless I was satisfied that the words used by the Legislature would not effectuate the purpose which I think was intended.

Upon this ground, I am of opinion that the judgment of the Court should be for the defendant.

Judgment for the defendant.

CHAMBERLAIN v. The WEST END OF LONDON and CRYSTAL PALACE Railway Company. May 2.

Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 68, and Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 6.—Lands “injuriously affected.”—Compensation.

Declaration stated that the defendants, a railway Company, under the powers of their Act, took for the purposes of their railway a portion of a highway from L. to W., and constructed the railway across it, and a deviation road and bridge over the railway, and by the execution of the railway and works houses of the plaintiff were injuriously affected; and set out proceedings in an arbitration under The Lands Clauses Consolidation Act, 1845, by which the umpire appointed by the arbitrators awarded compensation to the plaintiff. Plea, setting out the form of the appointment of the arbitrator on the part of the defendants, and the award, which recited the notice of the plaintiff to the defendants that, by the execution of the railway and works, they had injuriously affected certain houses of which the plaintiff was lessee, being four houses on the highway, and eight other houses which, at the time of the execution of the works, were in the course of erection for the purpose of being used as dwelling-houses, fronting a new road running at right angles to the highway, and found, that by reason of the obstruction of the highway, by the construction of the railway across the same, the access to the houses of the plaintiff was, notwithstanding the substitution of the deviation road, rendered less convenient for the occupiers, and many persons would be prevented from passing the same, and the houses had thereby been rendered less suitable for being used and occupied as shops, and the value of the houses had been greatly diminished. On demurrer, held by this Court, and affirmed by the Exchequer Chamber, that the houses of the plaintiff were injuriously affected within The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 68, and The Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 6, and therefore the plaintiff was entitled to compensation.

*THE déclaration stated that the defendants, under and by [virtue of the provisions of] “The West London and Crystal

Palace Railway Act, 1853," 16 & 17 Vict. c. clxxx., and "The West London and Crystal Palace Railway Act, 1857," 20 & 21 Vict. c. cxliii., and the Acts incorporated with those Acts respectively, were authorized to take and did take, for the purposes of a railway about to be constructed by them, a piece of land forming portion of a highway leading from London to Wandsworth, in the county of Surrey, and were authorized to construct and did construct the railway across the highway upon such portion of the same, and were authorized to construct and did construct a deviation road and bridge over the railway; that, by the execution of the railway and works authorized by the above mentioned Acts of Parliament, certain houses, buildings, tenements, and premises belonging to the plaintiff were injuriously affected, and the plaintiff thereupon became entitled to compensation in respect of such injurious affecting; that the defendants did not make satisfaction for the same under the provisions of The Lands Clauses Consolidation Act, 1845; and the plaintiff thereupon gave notice in writing to the defendants that he desired to have the compensation settled by arbitration, and stated in such notice the nature of his interest in the houses, buildings, tenements, and hereditaments, in respect of which he claimed compensation, and the amount of compensation so claimed therein; that the defendants were not willing, and disputed their liability, to pay the amount of compensation so claimed, and did not enter into any agreement *for that purpose within twenty-one days, or at any time after [*607 the receipt of the notice from the plaintiff; and, the plaintiff and the defendants not having concurred in the appointment of a single arbitrator to whom such dispute should be referred, the plaintiff, on the 17th October, 1860, by writing under his hand, appointed J. Y. to be an arbitrator to settle the amount of compensation to be paid by the defendants to the plaintiff in respect of such injurious affecting as aforesaid; and, the defendants not concurring in the appointment of J. Y. as a single arbitrator, thereupon, by writing under the hand of their secretary, appointed R. A. W. to be the arbitrator on the part of the defendants, to whom should be referred the question of disputed compensation; and the arbitrators so respectively appointed by the plaintiff and the defendants, before they entered upon the matter referred to them, did, in pursuance of the provisions of The Lands Clauses Consolidation Act, 1845, nominate and appoint, by writing under their hands, J. G. H. to decide on any matters, in respect of the question so referred to them, on which they should differ, or which should be referred to him under the provisions of that Act or of the said special Acts, relating to the defendants and their undertaking, or any or either of them; that the arbitrators afterward differed as to the matters referred to them, and thereupon J. G. H. took upon himself the reference and umpirage, and did duly make and publish his umpirage in writing respecting the matters referred, and delivered the same to the plaintiff. The declaration then stated the substance of the award, and that the umpire assessed the amount of compensation to be paid to the plaintiff by the *defendants [*608 at 1050*l.*, and that the plaintiff's costs of the reference were settled by the umpire at 309*l.* 9*s.* 3*d.* Averment, that all conditions

were fulfilled, &c., to entitle the plaintiff to maintain the action. Breach, non-payment of the above sums.

The plea set out the appointment of R. A. W. as arbitrator on the part of the defendants, in pursuance of the provisions of The West London and Crystal Palace Railway Act, 1853, and the Lands Clauses Consolidation Act, 1845, incorporated with and forming part of the first-mentioned Act; stating that to him should be referred the question of disputed compensation which was alleged by the plaintiff, but by no means admitted by the defendants, to have arisen between him and the defendants for and in respect of injuries by him alleged to have been occasioned by the construction of the works of the railway to property belonging to him, situated at Pavilion Terrace, Lower Wandsworth Road, consisting of four houses numbered 5, 6, 7 and 8 and also of eight other houses which, at the time of the erection of the works, it was alleged by the plaintiff were in course of erection, and partly erected, for the purpose of being used and occupied as dwelling-houses fronting the new road running at right angles to Pavilion Terrace on the west side thereof, and for the sum or sums of money to be paid by the defendants for the damage or injury alleged to have been occasioned by the works of the railway. It also set out the appointment of J. G. H. by the arbitrators, in pursuance of The Lands Clauses Consolidation Act, 1845, to be the umpire to decide on any matters in respect of the question referred to them [609] on which they should differ, or which should be referred *to him as such umpire under the provisions of that Act or the special Acts, relating to the Company and their undertaking, or any or either of them. The plea then set out the award of the umpire: which recited, among other things, the notice of the plaintiff to the defendants, dated 18th July, 1860, "that, by the execution of the railway and works authorized by the said Acts of Parliament, the said Company had injuriously affected certain houses, buildings, tenements and premises to which the said Benjamin Chamberlain was entitled as lessee for a term of ninety-nine years from Christmas, 1856 (subject to certain apportioned ground-rents of 13*l.*, 17*l.* and 30*l.* respectively), the same being and consisting of four houses, numbered respectively 5, 6, 7 and 8, Pavilion Terrace, Lower Wandsworth Road, and eight other houses or buildings which, at the time of the execution of the said works, were in course of erection, and partly erected, for the purpose of being used and occupied as dwelling-houses fronting the said new road running at right angles to Pavilion Terrace aforesaid, on the west side thereof;—and that he was entitled to compensation for such injurious affecting of the said premises, and that the said Company had not made satisfaction for the same under the provisions of The Lands Clauses Consolidation Act, 1845": and he therefore gave the said Company also notice that he claimed, as compensation for such injurious affecting, the sum of 1200*l.*; and that, in case the said Company should refuse or decline to pay him that sum, he desired to have the amount of compensation claimed by him settled by arbitration, in accordance with the said last-mentioned Act: and then proceeded [610] as follows, "Now *I, the said umpire, having taken upon myself the burthen of the said reference and umpirage, do find that the plaintiff was entitled to the said houses, buildings, tenements

and premises in the said notice bearing date the 18th July, 1860, mentioned, as lessee thereof for the term as in the said notice mentioned; and I find that the said houses, &c., are situated as they appear and are described in the plan hereto annexed. And I find that, by reason of the obstruction of the high road leading from London to Wandsworth by the construction of the said railway across the same at the spot and in the manner indicated and described in the said plan, the access to the said several houses, &c., of the said Benjamin Chamberlain is, notwithstanding the substitution of the said deviation road, as indicated and described in the said plan, rendered less convenient for the occupiers thereof and all other persons than it was and would have been but for such obstruction; and by reason of the said obstruction very many persons, who but for the same would have passed the said several houses, buildings, tenements and premises of the said Benjamin Chamberlain, have been and will be, by reason of the said obstruction, prevented from passing the same; and the number of persons who, but for the obstruction, would have passed the said several houses, &c., has been, by reason of the said obstruction, greatly diminished, and the said several houses, &c., have thereby been rendered less suitable for the purpose of being used and occupied as shops; and by reason of the premises the value of the said houses, &c., has been greatly diminished. And I find that, by reason of the premises, the said several houses, &c., have been injuriously affected *by the execution of the works of the said Company; [*611 and I find and assess the amount of compensation to be paid to the said Benjamin Chamberlain, by the said Company in respect of such injurious affecting, at 1050*l.*"

Demurrer, and joinder therein.

The map and a plan, which were produced, showed that the four houses, No. 5, 6, 7, 8, Pavilion Terrace, were on the original highway from London to Wandsworth on the south side of it, No. 8 being The Pavilion Tavern; and that the other eight houses were on an intended new road running southward at right angles to the old highway from The Pavilion Tavern, which was a corner house. The original highway was blocked up by the railway passing across it about seventy yards to the east of No. 5. The deviation road commenced some distance to the west of the houses in Pavilion Terrace and passed along an embankment on a gradual incline on the north side of the old highway, and so was carried over the railway by a bridge. The embankment opposite to the four houses in Pavilion Terrace was of the same height as the first floor windows of those houses; and, in order to get from them to the deviation road, foot passengers might go up a flight of steps on the side of the embankment, but carriages must go along the old highway to its point of junction with the deviation road.

Lush (with him Kemplay), for the plaintiff.—The access to the plaintiff's houses is made more difficult by the diversion of the highway: they are no longer situated by the roadside, but in a lane, one end of which the line of railway, crossing it, stops up. Therefore they are injuriously affected by the construction of the *railway [*612 within sect. 6 of The Railways Causes Consolidation Act, 1845, 8 & 9 Vict. c. 20; so that the last allegation in the award is in truth only a conclusion of law.

In Reg. v. The Eastern Counties Railway Company, 2 Q. B. 347

(E. C. L. R. vol. 42), where the injury was caused by lowering the highway on which the land of the prosecutor abutted, it was held that he was entitled to compensation. [BLACKBURN, J.—In *Re Penny* and The South Eastern Railway Company, 7 E. & B. 660, 669, Lord Campbell, C. J., said: “Unless the particular injury would have been actionable before the Company had acquired their statutory powers, it is not an injury for which compensation can be claimed :” that is an intelligible rule.] It had been before laid down in *Broadbent v. The Imperial Gas Company*, 7 De G. M. & G. 436, 456, in which Lord Cranworth, C., was assisted by Crompton and Willes, JJ.; where Willes, J., delivering the joint opinion of Crompton, J., and himself, said: “We consider it to be a universal rule, applicable to this class of statutes, that statutory compensation is given only for acts authorized by the statute in effect for taking away the right of action of the person injured.” *Rex v. The London Dock Company*, 5 A. & E. 163 (E. C. L. R. vol. 31), was decided on the section of a special Act which does not contain the words “injuriously affected ;” and that case was practically overruled by *Reg. v. The Eastern Counties Railway Company*, 2 Q. B. 347 (E. C. L. R. vol. 42). [MELLOR, J.—In *The East and West India Docks and Birmingham Junction Railway Company v. Gattke*, 3 Mac. & G. 155, it was held that the words “injuriously affected,” in *sect. 68 of stat. 8 & 9 Vict. c. 18, were not confined to the case of lands taken or directly interfered with, but extended to a case of consequential damage. BLACKBURN, J., referred to 2 Chitty’s Statutes, 2d ed., by Welsby and Beavan, p. 822, note (c.)] *Wilkes v. The Hungerford Market Company*, 2 Bing. N. C. 281 (E. C. L. R. vol. 29), which was an action for continuing an authorized obstruction of a highway for an unreasonable time, whereby the plaintiff sustained damage, likewise shows that this is the subject of an action. [He also referred to *Moore v. The Great Southern and Western Railway Company*, 10 Irish Com. Law Rep. 46, and *Touhey v. Same*, 10 Irish Com. Law Rep. 98; and was then stopped.]

Hawkins (with him *Rochfort Clarke*), for the defendants.—The injury which gives a right to compensation under The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 68, the words of which are the same as those of The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 6, is an injury to the land. Here the injury is the loss of custom by the diversion of the traffic from the plaintiff’s houses, which is a personal injury. [COCKBURN, C. J.—There is a diminution of access to the plaintiff’s houses.] That is an inconvenience which the plaintiff suffers in common with the public who have to pass along the raised road instead of on the level. Injury to business is not actionable: *Rex v. The Directors of the Bristol Dock Company*, 12 East 429. [CROMPTON, J.—There an indictment would not have lain, because the prosecutor was not injured beyond the other subjects *614] of the King. BLACKBURN, J.—In *The East and West India Docks and Birmingham Junction Railway Company v. Gattke*, 3 Mac. & G. 155, 168, Lord Truro distinguishes the case before him from *Rex v. The Directors of the Bristol Dock Company*, 12 East 429, and *The London and North Western Railway Company v. Smith*, 1 Mac. & G. 216, on that very ground.] *Wilkes v. The Hungerford Market Company*, 2 Bing. N. C. 281 (E. C. L. R. vol. 29), was cited

and distinguished by the Court in *Rex v. The London Dock Company*, 5 A. & E. 163, 178 (E. C. L. R. vol. 31), where Lord Denman said, p. 177: "The question raised on this return is, whether the Company, in making certain works authorized by the 9 G. 4, c. cxvi., are made liable by the 89th section of that Act to compensate the complainants for the consequential injury resulting therefrom to their property." [COCKBURN, C. J.—How is that case consistent with *Reg. v. The Eastern Counties Railway Company*, 2 Q. B. 347 (E. C. L. R. vol. 42)? BLACKBURN, J.—In *Re Jubb v. The Hull Dock Company*, 9 Q. B. 443, 457 (E. C. L. R. vol. 58), the Court refer to *Rex v. The London Dock Company*, 5 A. & E. 163, 178 (E. C. L. R. vol. 31), and point out that the principle on which the decision in that case proceeded was that no part of the lands was taken.] In *Re Jubb v. The Hull Dock Company*, 9 Q. B. 443, 457 (E. C. L. R. vol. 58), the compensation clause was not limited to lands taken. In *Reg. v. The Great Northern Railway Company*, 14 Q. B. 25, 29 (E. C. L. R. vol. 68), where the claim was for injury to a ferry appurtenant to lands, Patterson, J., in delivering the judgment of the Court, distinguishes *Rex v. The London Dock Company*, 5 A. & E. 163, 178 (E. C. L. R. vol. 31): he says: "Objection is also made that this case is within the principle of The London Dock Company's Case, where it was held that the destruction of houses and public *roads in the neighbourhood of [*615] a public-house, by which the custom of a house was diminished, was not the subject of compensation. But the present case is quite distinguishable. Here the ferry is a private right; and, if it be attached to the land of Cooling, the value of that land is seriously affected." [CROMPTON, J.—Since the Act, upon which *Rex v. The London Dock Company*, 5 A. & E. 163 (E. C. L. R. vol. 31), was decided, large words have been introduced into the compensation clauses taking in every kind of injury—namely, "lands taken or injuriously affected."] Those words must be limited to injury to land, otherwise they would include damage arising from the vibration caused by the passing of trains, which, in *Re Penny and The South Eastern Railway Company*, 7 E. & B. 660, 672 (E. C. L. R. vol. 90), Lord Campbell said was not a ground of compensation. They would also embrace injury from the lands of a farm being severed. Indeed, it would be difficult to say where the line could be drawn.

Lush was not called upon to reply.

COCKBURN, C. J.—I am of opinion that the plaintiff is entitled to judgment. Whenever the powers conferred on a railway Company interfere with private rights, I think the sound and wholesome test is that laid down by Lord Campbell in *Re Penny and The South Eastern Railway Company*, 7 E. & B. 660, 669 (E. C. L. R. vol. 90), that if an action would have lain for the injury done by the Company's works unless their Act had authorized them, then the land is injuriously affected, and compensation may be awarded.

*CROMPTON, J.—The reason of the judgment in *Iveson v. Moore*, 1 Ld. Raym. 486, Carth. 451, 1 Salk. 15, 12 Mod. 262, [*616] Com. 58, given from a manuscript note of Willes, C. J., in a note to *Chichester v. Lethbridge*, Willes 71, 74, note (a), and which was cited by Tindal, C. J., in *Rose v. Groves*, 5 M. & G. 613, 617 (E. C. L. R. vol. 44), applies to this case.

BLACKBURN, J.—This Court, in *Dobson v. Blackmore*, 9 Q. B. 991, 1002, 1003 (E. C. L. R. vol. 58), approved the case of *Chichester v. Lethbridge*, Willes 71, 74, note (a), and in a considered judgment affirmed the principle that an individual who sustains special damage, more than the rest of Her Majesty's subjects, from the unlawful obstruction of a highway may maintain an action.

MELLOR, J., concurred.

Judgment for the plaintiff.

*617] *IN THE EXCHEQUER CHAMBER.

CHAMBERLAIN v. The WEST END OF LONDON and CRYSTAL PALACE Railway Company. [Feb. 2, 1863.]

For head-note, see ante, p. 605.

THE defendants having brought error upon the above judgment, the case was argued in Michaelmas Term, November 26th, 27th, 1862, and Hilary Vacation, February 2d, 1863.

Rochfort Clarke, for the defendants.—The test laid down by Lord Campbell in *Re Penny* and *The South Eastern Railway Company*, 7 E. & B. 660, 669 (E. C. L. R. vol. 90), and adopted by the Court below in this case, is not well founded. [*WILLIAMS, J.*—That test was first suggested by my brother Keating in arguing the case of *Glover v. The North Staffordshire Railway Company*, 16 Q. B. 912, 923 (E. C. L. R. vol. 83), and was adopted eulogistically by Lord Campbell.] In *Re Penny* and *The South Eastern Railway Company*, 7 E. & B. 660, 667, 668 (E. C. L. R. vol. 90), the judgment of Lord Cranworth, C., in *The Caledonian Railway Company v. Ogilvy*, 2 Macq. 229, 235, on the same point was referred to, which is guarded thus: “I am far from admitting that he would have a right of compensation in some cases in which, if the Act of Parliament had not passed, there might

*618] have been not only an indictment, but a right of action.”

*618] *And then Lord Campbell said: “I think he would be entitled to compensation in such cases;” and *Erle, J.*, “Even where the damage was only a scintilla.” There is some inaccuracy in the report of that dictum. [*ERLE, C. J.*—That dictum is certainly foreign to the bent of my mind.] In *The Caledonian Railway Company v. Colt*, 3 Macq. 833, 838, 839, Lord Campbell, C., said: “It is well settled that this statutory tribunal is only established to give compensation for losses sustained in consequence of what the Railway Company may do lawfully under the powers which the Legislature has conferred upon them, and that for anything done in excess of these powers, or contrary to what the Legislature, in conferring these powers, has commanded, the proper remedy is a common-law action in the common-law Courts.” [He also referred to *The New River Company*, appts., *Johnson, respt.*, 29 L. J. M. C. 93, 6 Jur. N. S. 374.] [*ERLE, C. J.*—What is the boundary line between such an injurious affecting of land as entitles a person to compensation, and such as does not?] There must be a direct injury to land, including in that word tenements and hereditaments, and not merely consequential

damage. The diversion of traffic on a public highway, upon which a person has begun to build houses, is not a case for compensation. The diverting of this highway affects the whole neighbourhood, and it is a necessary damage to the neighbourhood from the making of the railway, and does not interfere with the land as such. [WILLIAMS, J.—Suppose an acre of land, with a frontage to a highway, which a surveyor has valued at 1000*l.*, and the highway is withdrawn [*619 and he then values it at 500*l.* only, is not the land injuriously affected?] Not within the meaning of The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, and The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20.

The sections of stat. 8 & 9 Vict. c. 18, from sect. 22 to sect. 68, inclusive, relate to the purchase and taking of lands. The provisions relating to the stopping up and diverting of roads, whether public or private, are in stat. 8 & 9 Vict. c. 20, from sect. 46 to sect. 64 inclusive." By sect. 53 the Company, before they interfere with any road, are required to substitute another as convenient or as nearly so as may be. By sect. 54, if they fail to do so, they are liable to a penalty of 20*l.* for every day during which the default continues, recoverable by the trustees of the road if it is a public road, or in case of a private road by the owner thereof. And, by sect. 55, if a person entitled to a right of way over any road interfered with by the Company shall suffer any special damage by reason of their default in making another road, he may recover that damage by action on the case. Again, by sect. 56, the Company are required to restore the road interfered with, or make a permanent substituted road, equally convenient as the former, or as near thereto as circumstances will allow; and, by sect. 57, if such road be not so restored or the substituted road so completed within certain specified periods, the Company shall forfeit 5*l.*, for every day after the expiration of such periods, to the trustees of the road if public, or if a private road to the owner thereof. No compensation is given for private injuries caused by the stopping up or diversion of public roads. And, in *Watkins v. The Great Northern Railway Company*, 16 Q. B. 961 (E. C. L. R. vol. 71), it was held that stat. 8 & 9 Vict. c. 18 took away the common-law right of action for an interference with a private right of way except when special damage had been sustained. The special Act empowers the Company to divert the old road, and gives the public a new one.

Rex v. The Bristol Dock Company, 12 East 429, and *Rex v. The London Dock Company*, 5 A. & E. 163 (E. C. L. R. vol. 81), are authorities in favour of the defendants. In the former case the injury to the water of the river Avon, by the works executed by The Bristol Dock Company under their Acts, was held to be a common damage for which the owners of a brewery could not claim compensation under a clause in one of the Acts which was larger in its terms than the compensation clauses in stats. 8 & 9 Vict. ccs. 18 & 20. In *Rex v. The London Dock Company*, this Court held that the tenants of a public-house, whose custom had been affected by the works of the Company cutting off the communication, were not entitled to compensation under a clause which gave compensation if any person having an estate or interest not less than a tenancy from year to year

in any houses, lands, &c., should be injured in his estate or interest by any of the works authorized by the Acts: and Lord Denman, in delivering the judgment of the Court, said, p. 179, "The inconvenience they complain of is not only one common in a greater or less degree to every inhabitant in the neighbourhood, but it is the *necessary* consequence of the lawful Act *done by the Company."
 *621] In *Rex v. Pease*, 4 B. & Ad. 30 (E. C. L. R. vol. 24), the principle urged by Sir F. Pollock in argument, p. 37, that in undertakings in which the public are largely interested "some public benefit is to be sacrificed to the greater public benefit derived from the undertaking," was adopted by Parke, J., in delivering the judgment of the Court, p. 41.

The cases relied upon by the plaintiff do not conflict with *Rex v. London Dock Company*, 5 A. & E. 163, 178 (E. C. L. R. vol. 31). In *Wilkes v. The Hungerford Market Company*, 2 Bing. N. C. 281 (E. C. L. R. vol. 29), which was recognised in *Rex v. The London Dock Company*, the declaration showed special injury to the plaintiff alone beyond the common and public nuisance. In *Reg. v. The Eastern Counties Railway Company*, 2 Q. B. 347 (E. C. L. R. vol. 42), the railway cutting caused an actual injury to the land; as Lord St. Leonards observed in *The Caledonian Railway Company v. Ogilvy*, 2 Macq. 229, 248, or at all events an injury to an easement in the nature of land, which was not common to all the Queen's subjects; and the case was decided upon the provisions of the special Act, 6 & 7 W. 4, c. civi. [ERLE, C. J.—That statute contemplated satisfaction for injury sustained by the raising or lowering of a highway.] In *Re Jubb v. The Hull Dock Company*, 9 Q. B. 443 (E. C. L. R. vol. 58), by the interpretation clause of The Hull Dock Company's Act, 7 & 8 Viet. c. ciii., the word "lands" extended to "profits;" and it was held that the premises of a brewery having been taken by the Company
 *622] for the purposes of their works, the owner was entitled to

*compensation for the loss of profits in his business until he could obtain other premises for carrying it on; the Court recognised *Rex v. The London Dock Company*, 5 A. & E. 163 (E. C. L. R. vol. 31), and pointed out, p. 457, that, "in that case no part of the premises had been taken or touched by the Company." In *Reg. v. The Great Northern Railway Company*, 14 Q. B. 25 (E. C. L. R. vol. 68), a ferry attached to land was cut off from it by the railway; and the Court distinguished that case from *Rex v. The London Dock Company*, on the ground that the value of the land was seriously affected by the interference with a private right. *Rex v. The Nottingham Old Water Works Company*, 6 A. & E. 355 (E. C. L. R. vol. 33), and *Bell v. The Hull and Selby Railway Company*, 6 M. & W. 699, were decided upon the provisions of the special Acts. In *Lawrence v. The Great Northern Railway Company*, 16 Q. B. 643 (E. C. L. R. vol. 71), the damage was caused by an improper exercise of the powers given to the Company, and the case was distinguished by the Court, p. 654, on that ground, from *Rex v. Pease*, 4 B. & Ad. 30 (E. C. L. R. vol. 24). In *Glover v. The North Staffordshire Railway Company*, 16 Q. B. 912, there was an interference with a private right. In *The Caledonian Railway Company v. Ogilvy*, 2 Macq. 229, decided upon the Scotch Acts, which also contain the words "injuriously affected," it was held

that stoppages and other inconveniences incident to the crossing of a public road by a railway on a level, being common to all the Queen's subjects, no particular or individual remedy existed: and Lord St. Leonards, p. 252, recognised *Rex v. The London Dock Company*. In *Moore v. The Great Southern and *Western Railway Company*, 10 Irish Com. Law Rep. 46, which was like *Reg. v. The Eastern Counties Railway Company*, 2 Q. B. 347 (E. C. L. R. vol. 42), the Company's works touched the boundary line of the plaintiff's property, and interfered with his private right of stepping out of his house into the highway; they actually took his land, the presumption being that he was owner *ad medium filum viae*. [EBLE, C. J.—The judgment of the Court did not proceed on that ground.] In *Tuohey v. The Great Southern and Western Railway Company*, 10 Irish Com. Law Rep. 98, the embankment which was opposite to the plaintiff's house caused rain water and mud to run into his house, and the action was held maintainable because the house itself and the access to it were impinged upon and interfered with, so that there was a "taking" of his "land" in the wide sense of that word.

As to the cases in Chancery. In *The London and North Western Railway Company v. Smith*, 1 Mac. & G. 216, where the defendant had a house similarly affected to the plaintiff's, an injunction was granted in order that the defendant might bring an action to try his right at common law; and Lord Cottenham said, p. 223, "If the Company are liable to him, it is obvious that they are also liable to all his neighbours; but the difference between the injury to one house and another in the same street must be very small and difficult to ascertain, when the case shall arise in which it may be held that one house is entitled to compensation and the next not." In *The East and West India Docks Company v. Gattke*, 3 Mac. & G. 155, the damage done was a direct injury to the land; and upon *that ground Lord Truro, C., p. 168, distinguished it from *The London and North Western Railway Company v. Smith*, 1 Mac. & G. 216. The *London and North Western Railway Company v. Bradley*, 3 Mac. & G. 336, and *The Sutton Harbour Improvement Company v. Hitchens*, 1 De G. M. & G. 161, followed: in these the Court refused to interfere. But the principle on which Lord Cottenham gave judgment in *The London and North Western Railway Company v. Smith*, was not overruled. In *Ware v. The Regent's Canal Company*, 3 De G. & Jones 212, 228, an injunction was refused by Lord Chelmsford, C., on the ground that no injury had been occasioned to any individual, or was imminent or was of irreparable consequence.

Further, the damages are only contingent and speculative, because some of the houses were not finished. In *Lee v. Milner*, 2 M. & W. 824, Lord Abinger said, p. 839, "In this case the jury have found no damage yet sustained: how then can they find a verdict for contingent damages, which may never occur at all?" In *Broadbent v. The Imperial Gas Company*, 7 De G. M. & G. 436, (a) which was an injunction to restrain the Company from using or making gas in such a manner as to permit its escape, Willes, J., in delivering the opinion of Crompton, J., and himself, pointed out, p. 458, that the damages were too uncertain to be ascertained once for all. It is observable

(a) Affirmed in H. L., 7 H. L. Cas. 600.

that the Gasworks Clauses Act, 1847, 10 & 11 Vict. c. 15, contains a special clause, sect. 29, that nothing in that Act or the special Act *625] shall prevent the Company from being "liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable in consequence of making or supplying gas, which shows that otherwise the party injured would have been deprived of his action.

The plaintiff is not entitled to all the damages given in the award. The notice of the plaintiff states that, "by the execution of the railway and works authorized by the said Acts of Parliament," not by their continuance, "the said Company had injuriously affected certain houses, buildings, tenements and premises of the plaintiff" as dwelling-houses, whereas the award gives compensation for damage to the houses of the plaintiff as shops.

Lush, for the plaintiff.—Sect. 6 of The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, is not confined to "owners and occupiers," but extends to "all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof," which shows that to entitle a person to compensation it is not necessary that land should be taken. Sect. 16, which enables the Company to divert this road, provides that they "shall make full satisfaction in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers." And sect. 68 of The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, defines the mode of recovering compensation.

Under these clauses an owner of land is entitled to compensation *626] wherever his lands are injuriously affected, "although they are not taken by the Company; and they are injuriously affected when the damage done to them by the execution of the works under the powers of the special Act would have entitled the owner to bring an action against the Company if the making of the railway had not been authorized by that Act: compensation being substituted for an action. There must be a detriment to the land by an act which would have been wrongful to the owner of the land but for the statutory powers under which it was done. [ERLE, C. J.—The owner of land, to whom the use of a highway is valuable, could not bring an action for the obstruction of it except in respect of the special loss which he sustained in each particular instance: *Paine v. Partrich*, Carth. 191.] Suppose the obstruction was permanent. [WILLIAMS, J.—The bringing successive actions was a means of compelling the defendant to remove such an obstruction or to give the price of the land.] The difference between an action for an obstruction and compensation is that the jury must give all the damages in one assessment: there is no means of obtaining compensation for recurring damage. [ERLE, C. J.—Can the stoppage of a highway be said to be a damage to land?] In *Reg. v. The Eastern Counties Railway Company*, 2 Q. B. 347 (E. C. L. R. vol. 42), compensation was given for damage affecting the value of land. [He also cited *Wilkes v. The Hungerford Market Company*, 2 Bing. N. C. 281 (E. C. L. R. vol. 29).] The umpire has found that by reason of the obstruction of the highway by the railway, the value

of the plaintiff's premises has been greatly diminished, and he has shown in what manner.

*This is a case in which an action would have lain, supposing the works had not been authorized by an Act of Parliament. [*_627 In The Caledonian Railway Company v. Ogilvy, 2 Macq. 229, the whole claim was for personal inconvenience occasioned to the occupier of a house by reason of the railway being made to cross the highway on a level, and Lord Cranworth, C., and Lord St. Leonards put their judgment on the ground that the claimant was not entitled to compensation for personal inconvenience. Lord Cranworth, C., supposes the case of a Company, without the authority of an Act of Parliament, making a railway across a public road, and erecting gates on it, and says, p. 236-7, "the owner of the estate might, with respect to any detention occasioned to him by the closing of those gates, bring an action against the makers of the railway, and, as he might do this *toties quoties*, he would probably have more frequent rights of action than other subjects of Her Majesty. But it would only be a more frequent repetition of the same damage; it would not be any damage different from that which might be sustained by any other subjects of Her Majesty; for all attempts at arguing that this is a damage to the estate is a mere play upon words. It is no damage at all to the estate, except that the owner of that estate would oftener have a right of action from time to time than any other person, inasmuch as he would traverse the spot oftener than other people would traverse it." Here the umpire finds that it is a damage to the estate, and that is a question of fact. Lord St. Leonards says, pp. 246-7, "It must be utterly indifferent to a case *of this sort whether land be taken [*628 or not as an abstract question; because it is quite settled that there may be a damage, and compensation may be required by a party from whom no land is taken." And both the learned Lords approved of Reg. v. The Eastern Counties Railway Company, 2 Q. B. 347 (E. C. L. R. vol. 42), 2 Railw. Cas. 736. In Moore v. The Great Southern and Western Railway, 10 Irish Com. Law Rep. 46, the plaintiff occupied a cottage and a small piece of land, on a level with and abutting on a public high road from which a short way or passage over the plaintiff's land afforded access to his cottage. The railway Company, in the execution of their works, lowered the public high road seven feet, leaving the plaintiff's land and cottage on the edge of a precipice of that height, and thereby obliging the plaintiff to make use of a step ladder in order to obtain access from the public highway to the way or passage leading over his land to his cottage; and it was held by the Exchequer Chamber in Ireland (affirming the judgment of the Queen's Bench there) that the action was not maintainable, the injury complained of by the plaintiff being an injury of a permanent nature to his land, and therefore the subject of compensation, under The Railways Clauses Consolidation Act, 1845, sect. 6, and the Irish Act, 14 & 15 Vict. c. 70, by which it is modified. In Tuohay v. The Great Southern and Western Railway Company, 10 Irish Com. Law Rep. 98, the plaintiff occupied a dwelling-house abutting on a public highway, and the railway Company in the execution of their works raised the public highway to the height of ten feet opposite to the plaintiff's house, and the special damage alleged to result from the acts

*629] *of the defendants was, that the access to the plaintiff's house was impeded, and the house rendered damp and unwholesome by rain and mud, which penetrated into it from an adjoining bridge, whereby the plaintiff lost his health; and it was held that the action was not maintainable, the plaintiff's loss of health being the consequence of the injury to his house, and such injury being of a permanent nature and the subject of compensation under the statute.

The sections of stat. 8 & 9 Vict. c. 20 (ss. 53 & 54, 56 & 57), which require the Company when they interfere with any road to substitute another as convenient as the former, under certain penalties, are for the protection of the public or of the private person, and do not take away the compensation to which an owner or occupier who suffers a peculiar injury is entitled. As Lefroy, C. J., observed in *Tuohay v. The Great Northern and Western Railway Company*, 10 Irish Com. Law Rep. 103: "Not only is compensation given by the Legislature to individuals for any injury which they may sustain, but a penalty is also imposed for not duly substituting a proper road, before proceeding to interfere with an existing one; which penalty, in the case of a public road, may be sued for by the trustees or other persons in whom the management of such road is vested; and, in the case of a private road, by the owner of such private road."

The cases in Chancery only show that this is a matter in which those Courts will not interfere, and that it is to be dealt with at common law.

Rex v. Pease, 4 B. & Ad. 30 (E. C. L. R. vol. 24), was an indictment for doing that which the Act expressly authorized to be done. In

*630] **Glover v. The North Staffordshire Railway Company*, 16 Q. B. 912 (E. C. L. R. vol. 71), which lays down the same principle as *Wilkes v. The Hungerford Market Company*, 2 Bing. N. C. 281 (E. C. L. R. vol. 29), a private way leading across a public road was obstructed, and it was held that the land of the plaintiff was injuriously affected. In *Rose v. Groves*, 5 M. & Gr. 618 (E. C. L. R. vol. 44), the plaintiff occupied a public-house, abutting upon the river Thames, to which persons used to come by boats, and the defendant floated a quantity of timber close to the plaintiff's premises and so obstructed the access to his house; and it was held that special damage was shown for which an action would lie. Where such damage is sustained, the owner of land has the same right to compensation as if a private way was obstructed. In *The New River Company*, appts., Johnson, resp., 29 L. J. M. C. 93, 6 Jur. N. S. 374, which was a complaint for diverting water from the well of the respondent, the order of justices for payment of compensation to the respondent was quashed because he had no right to underground water.

As to the argument that the damages were speculative, and that the plaintiff was not entitled to all the damages given, it is found that four of the houses were completed, and the others were in course of construction; and the amount of damage sustained is a matter of fact for the umpire. The plaintiff must recover it once for all. But, even if the umpire was wrong in awarding compensation to the extent he has

*631] **Mortimer v. The South Wales Railway Company*, 1 E. & E. 375 (E. C. L. R. vol. 102). The Company should have asked the um-

pire to sever the damages; the only course which can be taken now is to move to set the award aside, as was done with reference to the inquisition in *Re Penny* and The South Eastern Railway Company, 7 E. & B. 660 (E. C. L. R. vol. 90).

Rochfort Clarke, in reply.—The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 68, relates to "lands" construed in the narrow sense of that word; though by the interpretation clause, sect. 3, the word "lands" shall extend to "hereditaments," it cannot in sect. 68 apply to an easement: that section applies to cases in which the Company exercise a dominion over lands of an owner, and not to the case of a highway obstructed or diverted. And The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, ss. 6, 16, apply where damage is done by the works of the Company in the course of their construction, or where land is taken by them for carrying on their works. Sect. 16 relates to matters which the Company may do irrespective of the powers given by the Act, and to the manner in which they execute their works; *Reg. v. The East and West India Docks and Birmingham Junction Railway Company*, 2 E. & B. 466, 474 (E. C. L. R. vol. 75), per Lord Campbell: and the proviso to that section requires the Company to give satisfaction "for damage," not "for injuriously affecting." If the embankment on which the substituted road is carried does not affect the light or air of the plaintiff, or the access of his house to the highway, it is a common public inconvenience for which *he is not entitled to compensation. [*682 This is a legal diversion of the highway for the purposes of the railway, which is a new kind of highway. Formerly this would have been inquired into by a writ of *ad quod damnum*, upon which the question would be whether the diversion was inconvenient to the public, not whether it was inconvenient to private persons. And under the Highway Act, 5 & 6 W. 4, c. 50, compensation is not recoverable for the diversion of a highway; the remedy given by sects. 88, 89, is by appeal to the Quarter Sessions, who are to summon a jury "for the purpose of determining whether the proposed new highway is nearer or more commodious to the public, or whether the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or whether the said party appealing would be injured or aggrieved." But no person, by the common law or the Highway Acts, could recover compensation for damage resulting from the lawful diversion or abandonment of a highway. [He also cited *The Governor of the Cast Plate Manufacturers v. Meredith*, 4 T. R. 794, *Rex v. Russell*, 6 B. & C. 566 (E. C. L. R. vol. 18).] Further, the railway may be abandoned, and in that case, by stat. 15 & 16 Vict. c. clxxvii., s. 43, the highway must be reinstated; which shows that the damages are uncertain and therefore cannot be recovered: *Lee v. Milner*, 2 M. & W. 824. [ERLE, C. J.—The presumption is that things will continue *in statu quo*.] In *Glover v. The North Staffordshire Railway Company*, 16 Q. B. 912 (E. C. L. R. vol. 71), the Company exercised dominion over a private way; and Lord Campbell said, p. 921, "In some instances, and they often are cases of great hardship, land is depreciated *in value without being what the statute terms injuriously affected." *Rose v. Groves*, 5 M. & Gr. 613 (E. C. L. R. vol. 44), was an action for obstructing the access to the

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plaintiff's house, and there was an averment of intentional damage to the plaintiff: there was an injury to the plaintiff with which the public had nothing to do. In *Wilkes v. The Hungerford Market Company*, 2 Bing. N. C. 281 (E. C. L. R. vol. 29), the injury of which the plaintiff complained was injury to his business as a shopkeeper; and *Bosanquet, J.*, p. 298, said, "It *may* be that others have also been injured in the same way, and a case has been put in argument of every individual shopkeeper in a long line of streets suffering a like injury from the same cause. That extreme case, however, does not resemble the present, in which the peculiar injury is put as only accruing to a single individual." In *Iveson v. Moor*, 1 Ld. Raym. 486, Carth. 451, 1 Salk. 15, 12 Mod. 262, Com. 58, which was an action for obstructing a highway, and so preventing access to a colliery "*propè adjacens*" to the highway, the damage was direct. *Turton, J.*, one of the Judges who in holding that the action lay, differed from Lord Holt, expressly did so on the ground that the way was stopped maliciously, as was proved before him on the trial; and in *Willes* 74, note (a), it is said the reason of the judgment of the rest of the Judges "was principally this, that it sufficiently appeared that the plaintiff must and did necessarily suffer a special damage more than the rest of the King's subjects by the obstruction of this way." In *Hubert v. Groves*, 1 Esp. 148, Lord Kenyon nonsuited the plaintiff in an action for consequential damage to his business as a coal and timber merchant by the defendant laying large quantities of earth and rubbish, by which the street was obstructed, and the plaintiff obliged to carry his coals and timber by a circuitous and inconvenient way; and that ruling was upheld by the Court. And in *Rose v. Miles*, 4 M. & S. 101, 103, Lord Ellenborough distinguished the case from *Hubert v. Groves*, 1 Esp. 148, on the ground that the plaintiff was in the act of using the navigation when he was obstructed; and said, "this is something substantially more injurious to this person, than to the public at large, who might only have it in contemplation to use it."

The damages to the houses which were not finished were contingent and speculative, and therefore are not recoverable; and the award, being bad in part, is bad *in toto*. In *Re Penny and The South Eastern Railway Company*, 7 E. & B. 660 (E. C. L. R. vol. 90), the defect was not apparent on the face of the inquisition; and in *Mortimer v. The South Wales Railway Company*, 1 E. & E. 375 (E. C. L. R. vol. 102), the proceedings before the sheriff were, upon the face of them, perfectly regular. But in *Re The North Staffordshire Railway Company and Wood*, 2 Exch. 244, which was an application to set aside an award, on the ground that the umpire had awarded one entire sum for lands as to some of which there was no valid submission, Parke, B., said, p. 250, "It is clear that the umpire has fixed the sum awarded as the value of the entire lands. The award is bad, but whether we ought to set it aside is another question;" and Pollock, C. B., said, "If the objection is quite patent, there is no necessity for our interference." And in *The Caledonian Railway Company v. Ogilvy*, 2 Macq. 229, *the House of Lords sent the case back to the Court of Session because the verdict was for "severance and level crossing," without distinguishing how much was to be for "severance"

and how much for "level crossing," and it was impossible to reduce the verdict quoad "the level crossing," which did not ground a claim for damages.

ERLE, C. J.—We are all of opinion that the judgment of the Court below ought to be affirmed.

This is an action brought upon an award made by an umpire under The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, in which the plaintiff seeks compensation on the ground that his land has been injuriously affected by the execution of the works of the Company. He claims under The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, and also under The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, which are in effect embodied in the special Act of the Company, 16 & 17 Vict. c. clxxx., sect. 65. The umpire finds as the facts on which the claim of the plaintiff rests that certain houses of the plaintiff, some of which were in the course of erection and others completed, were injuriously affected by the acts of the defendants; that their value was depreciated because the highway was stopped up, and the easy access which before existed to them was taken away. It is clear, therefore, that this case comes within the words of the enactments referred to, and it appears to be within the principle of law which governs these cases.

But Mr. Clarke contended that there was no ground of action, because the execution of the works of the *Company did no more than take away the enjoyment of a public right, and that the only remedy was by indictment; and that the judgment of the Court below, which applied the test whether the injury was such that, if the statute giving to the Company their powers had not passed, an action would have lain, was erroneous. But I take the principle which governs these cases to be correctly laid down in the note to *Ashby v. White*, 1 Smith's Leading Cases 252, 5th ed.: "There are, indeed, certain cases in which an act may be in law an *injury*, and may produce damage to an individual, and yet in which the law affords no remedy, or, at least no immediate one. These are cases in which the act done is a grievance to the entire community, no one of whom is injured by it more than another. In such a case the mode of punishing the wrongdoer is by indictment and by indictment only: 1 Inst. 56, a. Still, if any person have sustained a particular damage therefrom beyond that of his fellow citizens, he may maintain an action in respect of that particular damnification." I think that the fact found by the umpire, that the plaintiff's houses have been injuriously affected, is a finding that he has suffered "particular damnification;" and, he finds specially how that injurious affecting would be occasioned;—viz., that by the obstruction to the thoroughfare the number of persons passing by the plaintiff's houses would be diminished, and consequently the prospect of customers to the occupiers of the houses in respect of any branches of industry carried on in them would be injured. Therefore I am of opinion that a particular damage to the plaintiff by the obstruction of the highway is made out.

* And I am supported in this by the analogy of several cases. *Moore v. The Great Southern and Western Railway Company*, [**637 10 Irish Com. Law Rep. 46, is in principle very closely allied to the

present, for there the Company did not take any part of the plaintiff's land, but, in order to lower the road, made a deep cutting along the boundary of his land, so that he was deprived of the easy access to his house and premises which he before enjoyed; and it was held that this was a permanent injury for which he was entitled to compensation. Here the Railway Company have substituted a new highway for the old one; the old highway is blocked up, and the plaintiff's houses are as inaccessible as was the plaintiff's house in *Moore v. The Great Southern and Western Railway Company*. The same principle was acted upon in *Reg. v. The Eastern Counties Railway Company*, 2 Q. B. 347 (E. C. L. R. vol. 42), where the Company, in order to carry their railway over a highway which before passed the prosecutor's land on a level, lowered the road so that his land was left on a high bank. I do not rely on *Tuohey v. The Great Southern and Western Railway Company*, 10 Irish Com. Law Rep. 98, because there was special damage besides the lowering of the road, viz. the causing mud to accumulate against the plaintiff's house. The other cases are abundant authority for our decision in favour of the plaintiff in the present case.

Mr. Clarke relied upon *The Caledonian Railway Company v. Ogilvy*, 2 Macq. 229, where the defendant was held not entitled to compensation by reason of the railway *crossing the high-way on a level near the lodge to his mansion. That looks like a judgment in favour of the defendants; but the principle of that judgment was that the respondent was claiming compensation for a personal inconvenience or annoyance and not for injury to his property.

It was said that these houses of the plaintiff are an inchoate speculation; four of them being completed and the rest being only in a state of inception. It was further contended that the damages were imaginary merely; and *Lee v. Milner*, 2 M. & W. 824, was cited to show that there could be no assessment of future damages, and that the plaintiff was bound to wait until the injury had occurred. But that case fails to support Mr. Clarke's argument. A person seeking to obtain compensation under these Acts of Parliament must once for all make one claim for all damages which can be reasonably foreseen. In *Lee v. Milner*, the jury, summoned under The Aire and Calder Navigation Act, 9 G. 4, c. xciii., to assess the sums of money to be paid to a tramroad Company for the purchase of land and for damages, found the value of the land, 6*l.*, present damages, 0, future damages 2800*l.* The Court held that the sum for future damages, which might never be suffered, could not be given by reason of the particular words of the special Act, which empowered the jury to assess the damages "for the future temporary or perpetual continuance of any recurring damages which shall have been so occasioned as aforesaid;" and it was considered that these words restrained the jury from giving damages unless there was *a permanent subsisting cause of injury, and that the Company had a peculiar privilege of requiring the undertakers of The Aire and Calder Navigation to summon a jury from time to time whenever a new cause of injury to the tramroad arose. Under the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845,

the party claiming compensation must bring forward his claim in unity, as far as he can foresee the damages which will arise, estimating them as having as much permanency as the railway; for we must take for granted that the arbitrator has considered the question whether the railway was likely to continue. We do not go into the question of value; the principle on which the arbitrator acted is right.

POLLOCK, C. B., and CHANNELL, B., and WILLIAMS and KEATING, JJ., concurred.
Judgment affirmed.

The partial obstruction of access to dwelling-houses was deemed in the principal case an injury which entitled the owner to compensation. The loss, however, of custom at a hotel, which was caused by a similar obstruction, was not considered a ground of action at law, nor what has been decided to be its equivalent, and convertible with it, a grievance recognised by statute: *Ricket v. Directors, &c., Metropolitan Railway Co.*, L. R. 2 H. L. 175. Lord Westbury dissented from this decision, thinking the destruction of the good-will constituted a legal injury to the property. He remarked: "It seems in the highest degree unreasonable to strip the house of its character, and of the use and purpose for which it has been constructed, fitted, and employed, and, having so done, to say that the interest of the occupier has sustained no damage, because the building or structure has not been deteriorated. A man gives a rent of 100*l.* per annum for a public-house, with good custom, long established, in some much-frequented thoroughfare, which house, if not used as a public-house, would not be worth 50*l.* per annum. Suppose, then, that the thoroughfare should be wholly or partially obstructed, and the custom of the house thereby diminished by one-half, is it consistent with common sense to say that the interest of the tenant in the house is not materially prejudiced? It is a fallacy, almost a mockery, to answer: 'The custom is one thing, and the house

another; and the injury is to the custom, not to the house.' You cannot sever the custom from the house itself, or from the interest of the occupier; for the custom is the thing appertaining to the house which gives it its special character and constitutes its value to the occupier, and for which he pays, in the high rent he has agreed to give. If you diminish the custom of a public-house, you diminish its value either to let or sell, and therefore you deteriorate the public-house, and the interest of the tenant therein. The true principle and only rule is, that in the inquiry whether the interest of the occupier of a messuage or building is damaged, that is, injuriously affected, you should estimate the value of the messuage or building to the occupier with reference to the use he makes of it, and the beneficial purpose for which he has hired it and fitted it up, and for which he has paid and pays the landlord a larger annual sum than the building *per se* would command; and if you find the use and enjoyment impaired by the works of the railway, you are bound to decide that the interest of the occupier is *pro tanto* damaged; that is, injuriously affected. It is clear that if the railway company, in the exercise of its statutory power, took the public-house entirely, it would have to pay for it according to its value as a public-house, and the interest of the occupier therein would be estimated with reference to the value of the custom of the public-

house ; but the same considerations by which the value of the entirety is estimated must apply, and be taken into account, when the question is, whether the value of the public-house, during a certain period of time, has or has not been deteriorated."

In *The Western Pennsylvania Railroad Co. v. Hill*, the court decided that an increase of the difficulty in obtaining access to a mill, by reason of the construction of a track by the side of the road leading to it, in consequence of which horses were frightened and customers were deterred from going to the mill, was a legal injury, which must be compensated by the railroad company : 6 P. F. Smith (Pa. 1867) 460. Though in Pennsylvania, it is to be borne in mind, the right to compensation is limited to cases where land of the plaintiff is taken, and the injury is the direct consequence of that taking : *Monongahela Navigation Co. v. Coons*, 6 W. & S. (Pa. 1843) 101; *Henry v. Pittsburg Bridge Co.*, 8 W. & S. (Pa. 1844) 85.

But an easement which so far obstructs an owner in the use of his property as practically to exclude him from the enjoyment of it, destroys his property, and constitutes a "taking," which entitles him to compensation for its total loss. The property consisted of a right of way, which was obstructed by the crossing of a railroad. It was objected that the legislature had only delegated power to take land, which must be interpreted in its popular sense. The court met this objection, and reduced it to absurdity, by saying, that if this were so, then, as the railroad company had no authority to take the easement, they must be arrested by the constitutional inhibition, which prevented private property from being taken without compensation : *Railroad Co. v. Williams*, 24 Leg. Int. 316, Oct. 4th 1867.

Whatever is destroyed is taken. Thus the city of Boston, authorized by legislation to take land and buildings for the purpose of laying out a street, deducted from the amount of compensation given, the value of the materials of the buildings taken down, because the materials of the buildings are not taken for public use. This decision recognised the fact that the building is not the material, which, when put together, constitute the structure. The building may be destroyed, and the material preserved : *Dugan v. City of Boston*, 12 Allen (Mass. 1866) 223; *Freeholders of Monmouth County v. Red Bank and Holmdel Turnpike Co.*, 3 Green (N.J. 1861) 91. Hence buildings are included in the estimate of land damages : *Patten v. Northern Central Railroad Co.*, 9 Cas. (1859) 426; *Dorlan v. E. B. & W. Railroad Co.*, 10 Wright (Pa. 1864) 520. When the town of Carrollton, La., ordered the destruction of plaintiff's houses, in order to erect a levee on their site, it was held bound to indemnify plaintiff for the value of the houses at the time they were taken : *Mithoff v. Carrollton*, 12 La. An. (1867) 185.

Just so far as the enjoyment of property is interfered with, is there a "taking," which entitles the owner to compensation. Thus the plaintiff was held entitled to compensation to the extent that his interest in a grist-mill was destroyed or impaired by the opening of a dam, directed by the legislature for the access of fish : *State v. Glen*, 7 Jones (N. C. 1859) 221; affirmed, *Cornelius v. Glen*, Id. 512. An act of the legislature which authorizes the destruction of a dam, erected to protect meadow lands from being overflowed, was held unconstitutional, because the value of the land would thereby be depreciated, and this partial obstruction constituted the "tak-

ing" of private property, for which compensation must be made: *Grover v. Powell*, 2 Stockton Ch. (N. J. 1854) 211. The occupation of a street by a horse railroad is a "taking" and acquisition by the company which decreases the enjoyment of that and adjoining property, and entitles the owner to compensation: *Craig v. R. C. & B. R. R. Co.*, 39 N. Y. (1868) 404. Said Miller, J.: "The company has the exclusive right of the track while the cars are passing, and all others must keep out of their way, and if a party is injured while they are proceeding at a reasonable and lawful speed, an action cannot be maintained against the company for the injury. The privilege of laying and using the track in such a manner confers upon the company a right to the use and enjoyment of the track, which precludes other vehicles while the operations of the company in the use of the track demand their exclusion. In *Williams v. The N. Y. C. R. R. Co.*, Selden, J., after stating the distinction between the two uses to which the highway is applied by converting it into a railroad track, proceeds to argue, that by means thereof two easements are created—one vested in the public, which has been paid for, and the other in the company—and remarks: 'These easements are property, and that of the railroad company is valuable. How was it acquired? It has cost the company nothing. The theory must be, that it is carved out and is a part of the public easement, and is therefore a gift of the public. This would do so, if it were given solely at the expense of the public. But it is manifest that

it is at the joint expense of the public and the owner of the fee. Ought not the latter to be consulted?' There is much force, I think, in these suggestions, and it is difficult to see how they can be answered satisfactorily and according to any well-settled legal principle." "In narrow streets, where the rails of the road border close upon the sidewalk, it not only interposes obstacles to the traveller, but inflicts injury upon the lot-owner, by blocking up the way and preventing a free access to the premises. The large and unwieldy vehicles which are used, which can only proceed upon a track laid for that purpose, with incapacity to turn out, so as to avoid or accommodate ordinary carriages, are often a source of annoyance and obstruction to the free passage of horses and carriages."

In an action to recover damages for injuries done to plaintiff's premises by water, in consequence of the diversion of the stream from its channel by the defendants, in constructing a culvert, the measure of damages is the depreciation in the value of the plaintiff's premises occasioned by the injury resulting from the defendants' acts. Smith, J.: "Where the deposit is comparatively extensive, and the cost of removing it would probably equal if not greatly exceed the value of the soil covered by it, the rule contemplates that the material deposited by the flood is to remain upon the plaintiff's land, and one of the items of damage is the depreciation in value of the land in consequence of its remaining:" *Easterbrook v. Erie R. R. Co.*, 51 Barb. (N. Y. 1865) 94.

*640] *The QUEEN v. TRAIN, HATHAWAY and Others.
April 24.

Highway.—Public Nuisance.—Tramways.—Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 98.

A person, without the authority of Parliament, but with the concurrence of and by virtue of a contract with the vestry of the parish, laid down in one of the streets of the metropolis a double line of tramways on which omnibuses of a peculiar construction plied for hire. These tramways were dangerous and inconvenient to many of the public, as the wheels of vehicles skidded when crossing the tramway, and horses which put their feet upon it were startled: held,

1. That this was a public nuisance, even though those tramways might be for the convenience of the public generally.
2. That what was here done could not be looked on as a mode of paving the street, and consequently was not within the powers conferred on vestries by The Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 98.

INDICTMENT. The first count charged that the defendants, on the 17th January, 1861, and on divers other days and times continuously, &c., a certain road, situate in the parish of St. Mary, Lambeth, in the county of Surrey, leading from Kennington Park, in the parish aforesaid, in the county aforesaid, to the south side of Westminster Bridge, in the parish aforesaid, in the county aforesaid, part whereof was known by the name of the Kennington Road and the other part whereof was known by the name of the Westminster Bridge Road, then and during all the time aforesaid being the Queen's common highway, used for all the liege subjects of our Lady the Queen, with their horses, coaches, carts and carriages to go, return, pass, repass, ride and labour at their free will and pleasure, unlawfully and injuriously did dig, entrench and cut into, and cause and procure to be dug, entrenched and cut into; and thereby then made, and caused and procured to be made, in the said *641] common highway, divers large and deep holes, to wit, to the number of 1000, and each of the depth of 1 foot, and divers deep and long trenches in the said common highway, to wit, of the depth of 1 foot and the length of 2000 yards; and then removed and caused and procured to be removed from the said common highway large quantities, to wit, 500 tons, of stone and earth of the soil of the said common highway; and unlawfully and injuriously did then lay down, place, and construct, and cause and procure to be laid down, placed and constructed, upon the said common highway, a certain iron tramway, extending for a long distance, to wit, for the distance of 2000 yards, along the said common highway; and unlawfully and injuriously did then lay and place, and cause and procure to be laid and placed, upon the said common highway, divers large quantities, to wit, 200 loads, of timber and 200 tons of iron rails; and so continued and permitted the said iron tramway and the said timber and iron rails to remain and be upon the said common highway from the day first aforesaid continually up to the time of the taking of this inquisition: Whereby the Queen's common highway aforesaid, then and on the first days and times aforesaid, to wit, from the day first aforesaid continually, &c., was obstructed, straitened, and encumbered, and rendered rough, uneven, and dangerous, so that the liege subjects of our said lady the Queen could not, then and during the times aforesaid, go, return, pass, repass, ride, and labour with their horses,

coaches, carts, and other carriages in, through, and along the Queen's common highway aforesaid, as they ought and were wont and accustomed to do: To the great damage and common nuisance of all Her Majesty's liege subjects going, returning, passing, repassing, riding, and labouring in, through, and along *the Queen's common [642 highway aforesaid, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

The second count charged that the road in question, being a common highway, &c., the defendants did, on the 17th January, 1861, amongst themselves, conspire, combine, confederate, and agree together unlawfully, wrongfully, and injuriously to obstruct, straiten, and encumber the highway, described in the first count, and to render and cause and procure it to be rough, uneven, and dangerous, so that the Queen's liege subjects could not go, return, pass, repass, ride, and labour with their horses, coaches, carts, and carriages in, through, and along that highway; and in pursuance thereof acted as described in the first count.

The third count charged that the defendants did, amongst themselves, on the 17th January, 1861, unlawfully conspire, &c., unlawfully, wrongfully, and injuriously, by making large and deep holes, and large and deep trenches in the highway described in the first count, and by removing from it large quantities of earth and stone of the soil of it, and by laying and continuing thereon a certain iron tramway of great length, to wit, of the length of 2000 yards, and by laying upon the highway large quantities of timber and iron rails, to obstruct, straiten, and encumber, and to render rough, uneven, and dangerous, the highway, so that the liege subjects of the Queen could not go, return, &c., in, through, and along the highway, &c.

The fourth count was the same as the second, only not stating the means by which the conspiracy was carried out.

*The defendants pleaded not guilty.

On the trial, before Erle, C. J., at the Surrey Spring Assizes, [643 it appeared from the evidence on the part of the prosecution, that the defendant Train had, with the assistance of the defendant Hathaway as his servant, laid down on the highway described in the indictment a double line of tramways, on which omnibuses of a peculiar construction plied for hire. The other defendants were the vestrymen of the parish of Lambeth, through which the tramways ran; and these had been constructed with their sanction, and under a contract for that purpose between them and Train. It was further shown that these tramways and the carriages which moved upon them were dangerous and inconvenient to many of the public, as the wheels of vehicles skidded when crossing the tramway, and horses which put their feet upon it were startled.

The defendants offered evidence to show that, although the tramways were productive of inconvenience to individuals, they were for the convenience of the public, because a very large number of persons used the omnibuses as a means of transit, to the great saving of their time and money. Erle, C. J., however, ruled that that evidence was immaterial, and rejected it: and he directed the jury that, if the tramways were a source of danger and inconvenience to a portion of the

public who had a right to use the highway, they would be a nuisance, without reference to their being for the general convenience. The jury found a verdict for the Crown against the defendants Train and Hathaway. With respect to the other defendants, several points of law having been raised, it was, by consent, arranged that no verdict [644] should be taken, and, on the *suggestion of this Court, a nolle prosequi was ultimately entered.

Bovill, on the part of the defendants Train and Hathaway, moved for a new trial on the ground of misdirection, that the above evidence had been improperly rejected, and that the verdict was against the evidence. (He also moved to enter a verdict, but it appeared that no leave for that purpose had been reserved.)—This case raises the very important question as to the legality of laying down tramways in the streets of the metropolis. Such have been laid down in Birkenhead, and also in America, with great success, and are a great convenience to the public. It is true that in *Rex v. Russell*, 6 B. & C. 566 (E. C. L. R. vol. 13), where a private individual impeded the navigation of a public river by taking possession of a portion of its bed, Holroyd and Bayley, JJ., held that the circumstance of his doing so being for the benefit of the public might be taken into consideration in determining whether the act was a nuisance. Lord Tenterden, however, dissented; and the decision of the majority of the Court in that case seems overruled by the subsequent case of *Rex v. Ward*, 4 A. & E. 384 (E. C. L. R. vol. 31), as well as inconsistent with *Rex v. Lord Grosvenor*, 2 Stark. 511 (E. C. L. R. vol. 3), cited in *Rex v. Ward*, p. 403, and with *Rex v. Morris*, 1 B. & Ad. 441, 447. In *Reg. v. Betts*, 16 Q. B. 1022 (E. C. L. R. vol. 71), also, Lord Campbell says, p. 1037, "According to the authority of Lord Hale, to that of Lord Tenterden in *Rex v. Russell*, and to the opinion of this Court in *Rex v. Ward*, it is for the jury to say whether an erection of this kind is a damage to the navigation or not. That the utility of such a work to the neighbourhood [645] or to the *public interests, generally, may be taken into account as a compensation, is a point on which, with great deference, I cannot concur with the majority of the Judges who decided *Rex v. Russell*. The true question is, whether a damage accrues to the navigation in the particular locality; and that is a question for the jury." But the present case differs from all those, for what was here done was for the purpose of regulating the use of the highway and the passage upon it. Parish officers are empowered, and it is every day's practice for them, to raise a portion of a highway for the convenience of foot passengers. They also lay down iron gutters in highways, and change the pavement to wood, granite, or even to iron;—things which are quite as dangerous to persons on horseback as tramways. They are also justified in putting down tramways along part of a highway for the purpose of keeping the heavy traffic clear from the rest.

The case may be looked at in another point of view. The borough of Lambeth is included in The Metropolis Local Management Act, 18 & 19 Vict. c. 120, sect. 98 of which enacts: "It shall be lawful for every vestry and district board from time to time to cause all or any of the streets within their parish or district, or any part thereof re-

spectively, to be paved or repaired when and as often and in such form and manner and *with such materials as such vestry or board think fit*, and to cause the ground or soil thereof to be raised or lowered, and the course of the channels running in, into, or through the same to be turned or altered, in such manner as they think proper, and to alter the position of any mains or pipes in or under such street, such alteration to be made subject to the approval of the engineer *of the Company to which such mains or pipes belong." What was [*646] done here was a mode of paving this metropolitan highway, a matter which this section leaves entirely within the control of the vestry.

It was therefore a question for the jury whether what was done here was a public nuisance, or a reasonable and convenient arrangement of the highway for the convenience of the public generally using that highway, and for the accommodation of the traffic upon it. The question is limited to the tramways, for the indictment does not charge the carriages as being a nuisance.

CROMPTON, J.—We are strongly of opinion that this conviction was right, and that, at least so far as Mr. Bovill's clients are concerned, there is no reason to disturb it. Our judgment proceeds on these short grounds. It was clearly shown by the evidence, and is established by the finding of the jury, that these tramways were a nuisance, dangerous and mischievous to passengers on the highway; and the defendants, by whom they were constructed, are therefore responsible for that nuisance, unless Mr. Bovill succeeds in establishing the proposition for which he contends. He tried to distinguish the present case from those which have settled the law that you cannot, for the benefit of one part of the public, interfere with the rights of passage of the rest over land or water. I understand him to admit that these tramways would be a nuisance to travellers passing across them, but he contended that, taking all the facts together, it was a question for the jury whether they were a nuisance, or whether what was done was not a reasonable and convenient arrangement for the use of the highway by the public generally. Supposing however, for the present, that his proposition *that an arrangement for the use of a [*647] highway in a particular manner being for the advantage of the public generally would be an answer to an indictment for that arrangement, this case does not come within that principle, seeing that this was not an arrangement for the ordinary use of the highway, and is very distinguishable from the cases he put. It may fairly be said, for instance, that the raising a portion of a highway for the use of passengers is allowable; but that is for the use of the highway quâ highway. And I do not say that there may not be cases where arrangements for the advantage of one class of persons may be allowable though mischievous to another class. But what has been done here is not making any arrangement for the use of the highway in the ordinary manner of using a highway. On the contrary, it is withdrawing so much of the highway from its ordinary use as such; for it is idle to say that you can use as an ordinary part of this highway the portion taken up by the tramways. A carriage meeting an omnibus running on one of them cannot give and take the road. The case is like that of *Reg. v. The United Kingdom Electric Telegraph Company*

(Limited), (a) which we have just disposed of, and others of a similar *nature. It also falls within Reg. *v.* The Longton Gas Company (Limited), 29 L. J. M. C. 118, 6 Jur. N. S. 601, with which we took a good deal of pains, where a gas company, without being authorized by a statute, opened trenches in the streets of a town for the purpose of laying down gas pipes; and this was adjudged a nuisance. If persons wish for power to act as the defendants acted here, they must take the usual regular and constitutional course of getting the protection of the Legislature.

Then was there any evidence to go to the jury that this was a proper use of the highway? I think not. It was put that these tramways would enable persons to pass conveniently from A. to B. So would a railway: but the defendants would clearly not be justified in making one in a highway, without the authority of Parliament.

Another point was raised by Mr. Bovill, namely that this was a mode of paving one of the streets of the metropolis, and consequently within The Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 98. This position provokes a smile:—it is almost ludicrous to call this a mode of paving.

There will therefore be no rule.

BLACKBURN and MELLOR, JJ., concurred.

Rule refused.

(a) This case of Reg. *v.* The United Kingdom Electric Telegraph Company (Limited) was tried by Martin, B., at the Spring Assizes for Bucks. It was an indictment against the defendants for erecting their telegraphic poles along the sides of the highways extending through a long tract of country, in such a manner as to obstruct the highways. A verdict having been given for the Crown, O'Malley, in the present Term, on the 17th April, moved for a new trial, on the ground of misdirection. The Judge took the course of writing down, during the trial, the direction he meant to give to the jury, and delivering it to the counsel; when the defendant's counsel, finding it hostile to his clients, submitted to a verdict. As, however, the reporters have been unable to obtain a sight of that document, or even of the papers in the case, they forbear attempting to give a formal report of it, and will merely state that the Court—consisting of Cockburn, C. J., Crompton and Blackburn, JJ.—having taken time to consider, refused the rule, on the principles laid down in Rex *v.* Wright, 3 B. & Ad. 581 (E. C. L. R. vol. 23), Reg. *v.* Russell, 3 E. & B. 942 (E. C. L. R. vol. 77), and Williams *v.* Wilcox, 8 A. & E. 314 (E. C. L. R. vol. 35). The powers of the Company have since been defined by stat. 25 & 26 Vict. c. xxxi.

END OF EASTER TERM.

***EASTER VACATION, 25 VICT. 1862. [*649]**

Ex parte BREDEN, an articled Clerk. May 14.

Articles of clerkship.—Omission to stamp articles.—19 & 20 Vict. c. 81.

The applicant had been for several years managing clerk to an attorney, who died, leaving a widow and son, whose service under articles to his father had not then expired. The business was carried on by C., an attorney, for the benefit of the widow and family; and the applicant entered into the service of C. to assist him in managing the business for their benefit until the son should be admitted an attorney. In June, 1858, the applicant was articled to the son, who had been admitted in the same year; and the widow promised to pay the stamp duty as an acknowledgment and recompense for his services. He entered into the articles upon this understanding, and did not discover that the duty had not been paid until after the time allowed by law for stamping and enrolling the articles had expired. In January, 1862, he petitioned the Lords of the Treasury, who directed the Commissioners of Inland Revenue to stamp the articles, on payment of the duty and penalty under stat. 19 & 20 Vict. c. 81, s. 3, and the articles were stamped accordingly. The Court refused to allow the service under the articles to be computed from the date of their execution; Cookburn, C. J., dubitante.

THIS was an application that the service of Matthew Breden, under articles of clerkship executed on the 11th June, 1858, between William Neal, an attorney of this Court, of the one part, and Matthew Breden, of the other part, might be reckoned and computed from the day of the execution thereof, notwithstanding the affidavit of execution was not filed within six months as required by stat. 6 & 7 Vict. c. 73, s. 8.

The affidavit of the applicant stated that he had been, for several years previous to the year 1854, managing clerk to Samuel Neal, a solicitor and attorney, and was so at the time of his death in January, 1854; that *William Neal, a son of Samuel Neal, was by articles bound to him with a view to his being admitted a solicitor and attorney, but he was not so admitted in the lifetime of S. Neal, by reason of his service under his articles not having expired in the lifetime of S. Neal; and an assignment of the articles was after the death of S. Neal executed to William Cox, a solicitor and an attorney, for the purpose of W. Neal completing his service under the articles, which he subsequently did; that the business of S. Neal was after his death carried on by Cox, for the benefit of the widow and family of S. Neal; and the applicant entered into the service of Cox for the purpose of assisting him in conducting and managing it for their benefit and until W. Neal should be admitted as solicitor and attorney, and in a situation to succeed to and carry on the same; that W. Neal, after he had completed his service under the articles in 1858, was admitted a solicitor of the Court of Chancery and an attorney of this Court, and took to the business previously carried on by S. Neal in his lifetime, as also to the business of Cox, who recently at his own request ceased to continue an attorney; that in consequence of the applicant having entered into the service of and remained with Cox, and his zeal and attention whilst in his service, and assisting him in conducting and managing the business of S. Neal after his death for

the benefit of his widow and family, and until W. Neal could be admitted as solicitor and attorney, he was, on the 11th June, 1858, bound, by articles duly executed and attested on unstamped paper, for a period of five years to W. Neal, with a view to his being admitted a solicitor of the Court of Chancery and an attorney of this Court, and W. Neal, at the time of the execution of the articles, promised that he would, *before the time limited by law expired for #651] paying the duty on the articles, obtain from his mother, the widow and executrix of S. Neal, the money required for the purpose of paying, and would duly pay with the same when so obtained the proper duty thereon, and have the necessary stamp of such payment affixed on the articles by the Commissioners of Inland Revenue; that the sum of money requisite for the payment of the duty on the articles was promised to be given to him by the widow, previous to the execution thereof, as an acknowledgment and recompense of services rendered by him to her and the family of S. Neal after his death, and for his having also, after his death, entered into the service of and remaining with Cox, for the purpose of assisting him in conducting and managing the business carried on by S. Neal in his lifetime, for the benefit of her and his family, and whereby large sums of money were derived for them; that he entered into and executed the articles upon the express faith and understanding that W. Neal would obtain the money from his mother and pay the proper duty on the articles and have the necessary stamp affixed thereon before the time allowed by law for such purpose expired; and that an affidavit of the due execution of the articles was made on the 10th December 1858 and within the time limited by law for so doing; that the applicant, after the time allowed by law for stamping and enrolling the articles had expired, and not before, discovered that the proper duty had not been paid on the articles, and the same consequently had not been stamped and enrolled; upon which he complained to W. Neal on the subject, and inquired #652] of him the reason why the same had not *been stamped; when he stated that he had applied to and requested his mother to hand him the money to pay the necessary and proper duty, who declined so to do, assigning her inability as an excuse then for not doing so, and that he would have then paid the duty if he could have afforded it; that the applicant was not in a position to have paid the duty at the time of the execution of the articles, nor was it ever agreed or intended he should do so; that in January last he presented a petition, founded on the above facts, to the Lords Commissioners of Her Majesty's Treasury, praying to be at liberty to stamp the articles on payment of the duty and necessary penalty, and their Lordships were pleased, under the 19 & 20 Vict. c. 81, s. 8, to order and direct the Commissioners of Inland Revenue to stamp the articles on payment of the duty and a penalty of 40*l*, and he had since paid the duty and penalty, and had the stamps denoting the payment of the same affixed; that the articles were on the 4th March duly enrolled, and had since been registered; that he had since the execution of the articles served W. Neal under them; that he was then in the forty-second year of his age, and had a wife and two children dependent upon his exertions for support, and no part of the duty or penalty was paid by W. Neal or his mother or any member of his family, and that but for the

assistance of friends, to whom he recently made known his position relative to the articles, he could not have paid the duty and penalty.

In this term, April 28th; before Cockburn, C. J., Crompton, Blackburn, and Mellor, JJ.;

Montagu Chambers was heard in support of the *application.—In *Ex parte Herbert*, 1 B. & S. 825 (E. C. L. R. vol. 101), this Court granted a similar application; and Cockburn, C. J., and Wightman, J., expressed an opinion that it might be done whenever the Lords of the Treasury, under stat. 19 & 20 Vict. c. 81, c. 3, directed that the stamp should be affixed to articles upon payment of the penalty. The Lords of the Treasury are by that enactment constituted the tribunal to decide whether there was an intention to defraud the revenue or to enter into articles speculatively. [CROMPTON, J.—All the cases in which Erle, C. J., expressed a strong opinion against such an application have been since that statute. In the Acts for regulating the admission of attorneys there are provisions which require the party to come to this Court. It has never been understood that the application would be granted as a matter of course after the applicant had obtained from the Lords of the Treasury direction that the articles should be stamped upon payment of the penalty; and in the cases in which a similar application was refused, such a direction had been obtained. The present case is stronger than where a person enters into articles upon speculation: seeing that here the applicant never intended to pay the duty himself; and at the time when he became acquainted with the fact of the non-payment of the duty, he went on with his service without paying it. COCKBURN, C. J.—But he went on in the hope that the money for the purpose would be given by the widow of his former master. If the applicant had gone to the Lords of the Treasury as soon as he discovered that the articles had not been stamped, I should have felt no difficulty in granting the application.] He pressed for the fulfilment of the promise that the duty should be *paid. [BLACKBURN, J.—Why did he not throw up the articles?] *Cur. adv. vult.* [*654]

CROMPTON, J. (May 14), delivered the judgment of the Court.

This was an application to this Court, in effect, to order articles to be taken as registered, and the affidavit to be taken as filed *nunc pro tunc*, according to the provisions of stats. 6 & 7 Vict. c. 73, s. 9, and 7 & 8 Vict. c. 86, s. 2. It was founded upon an affidavit of the applicant showing a case of considerable hardship, from which the Court would wish to relieve him if we could do so consistently with our duty in the exercise of the functions which the statutes impose on us, and with the decisions which have been made upon them.

The applicant had a promise from the executrix of his former master to give him the duty on his articles; he supposed for a few months that all that was required by law had been done, but, after the six months had elapsed, he discovered that it had not been done. He went on, however, serving under his articles for three or four years, with the full knowledge that the articles had not been stamped or enrolled, and now wants to have them taken as registered from the commencement of the service. We cannot order that consistently with the provisions of the statutes and the decisions in the Courts upon this very point.

The statutes make an application to the Court necessary for the purpose of antedating the commencement of the service to the registering of the articles and the filing of the affidavit. And this has always been considered as still necessary since the passing of stat. 19 *655] & 20 Vict. *c. 81, which, by sect. 3, allows the stamp to be affixed after the expiration of six months from the date of the articles in the discretion of the Commissioners of the Treasury. In all the cases in this Court since the discretion was given to the Commissioners, the course we have taken has been to see whether there has been any such mistake in the matter as that the applicant was not to blame. If the applicant had been led to suppose that he was serving under articles, which were duly registered, and that the stamp had been paid, and a proper affidavit made, we have treated it as a mistake and have not allowed the clerk to be prejudiced. But in the present case the applicant knew from the commencement, excepting the first few months, that he was not serving under proper articles, and if we allowed him to be admitted—that is, in effect, allowed the articles to be dated back—it would come to this, that whenever the Commissioners allowed the stamp to be affixed we must say that our functions ceased, and in every case be governed by their discretion.

My brother Erle, when in this Court, expressed a strong opinion against a person being allowed to put himself in the situation of being bound under articles not stamped: if he died, the stamp would never be paid; and he took the chance;—if he got on well in the law he would pay, otherwise not.

Such is the view of the majority of the Court. The Lord Chief Justice is disposed to take a wider view of our discretion, and to think that the Legislature meant that the Commissioners were to take care of the revenue; and upon that ground, which he expressed in *Ex parte Herbert*, 1 B. & S. 825, 828 (E. C. L. R. vol. 101), where I think we went to the limits of what we ought to do, he would have been *656] disposed to admit *the applicant, without, however, giving a positive dissent from our opinion. The majority of the Court think that we cannot go further than has been done, and therefore this application must be refused.

Application refused.(a)

(a) In Trinity Term following a similar application was made to the Court of Common Pleas, upon an affidavit stating some additional facts; and that Court, after conferring with this Court, granted the application. See 12 C. B. N. S. 251 (E. C. L. R. vol. 104).

IN THE EXCHEQUER CHAMBER.

ARCHER v. JAMES. May 14.

See this case reported, ante, pp. 67, 105.

IN THE EXCHEQUER CHAMBER.

LLOYD v. The QUEEN (in error). May 14.

Quo warranto.—Costs.—Corporate office.—9 Ann. c. 20, s. 5.

1. Information in the nature of a quo warranto alleged that the defendant, within the town of B., in the county of M., exercised, without legal warrant, the office of mayor; and together with O. R. and J. J., the powers and privileges of a body corporate, by the name and description of the Mayor and Bailiffs of the Borough of B. The defendant suffered judgment by default. Held, that the relator was entitled to costs under stat. 9 Ann. c. 20, s. 5.

2. Quere, whether stat. 9 Ann. c. 20, does not extend to cases in which a defendant has claimed to exercise a corporate office, whether there is a corporation or not?

INFORMATION in the nature of a quo warranto, against George Price Lloyd, alleged that there was, within the county of Merioneth, a certain town called, to wit, the town of Bala, and that the defendant had there *used and exercised, without any legal warrant or right whatsoever, the office of mayor of the said town, and, [*657 together with Owen Richards and John Jones, the powers and privileges of a body corporate, by the name and description of the Mayor and Bailiffs of the Borough of Bala; and for and during all that time had there claimed to be mayor of the said town, and to be, together with Owen Richards and John Jones, a body corporate, and to have, use and enjoy all the liberties, privileges and franchises of the office of mayor and, with Owen Richards and John Jones, of a body corporate, and does so presume to act, &c.

The information further stated that there was yearly and every year held within the town of Bala, to wit on the 24th October, a public fair for the buying and selling of merchandise, goods and chattels there; and that the defendant theretofore, to wit, on, &c., within the town aforesaid did, without any legal warrant or right whatsoever, together with Owen Richards and John Jones, by the name and description of the Mayor and Bailiffs of the Borough of Bala, claim as of right the liberty and privilege of taking and demanding, from every person attending the fair and placing their goods and chattels on the public highways for sale, certain toll; and did at the fair then and there held, without any legal warrant, Royal grant authorizing him or them in that behalf, or other right whatsoever, together with Owen Richards and John Jones, by such description as aforesaid, claim, demand and take, from certain persons attending the fair and placing their goods and chattels in the public highway for sale, a certain toll, and did then and there demand and take, as and for such toll as aforesaid, to wit: [stating various sums, from different persons]; &c.

*The information contained a similar averment as to a [*658 yearly fair held on the 8th November.

There followed an entry of the non-appearance of the defendant; and thereupon the usual judgment for the Crown, and that the relator recover against the defendant 100l. for his costs, according to the form of the statute in such case made and provided.

Assignment of error, and joinder therein.

Vaughan Williams, for the defendant.—The relator in this information is not entitled to costs under stat. 9 Ann. c. 20, s. 5. That

statute, as appears from its preamble, was intended to apply only to "cities, towns corporate, boroughs and places" which had mayors, bailiffs, portreeves, or other corporate officers, and the word "places" only extends to places of the same kind as those before enumerated, that is, corporate places: *Rex v. Wallis*, 5 T. R. 375, 379, per Lord Kenyon. And the "said offices," in section 4 & 5, are those referred to in the preamble. This information contains no allegation that the borough of Bala is an ancient borough, and that the mayor and bailiffs of the said borough were one body politic in deed, fact and name, by the name of the Mayor and Bailiffs of the Town of Bala; as in the Precedent, No. CLIX, in Corner's Crown Practice, App., p. 119. In the absence of such an allegation there is nothing to show that the defendant usurped any corporate office or any existing office touching the rule and government of a borough. It does not even appear that Bala is a borough. In *Rex v. M'Kay*, 5 B. & C. 640 (E. C. L. R. vol. 11), it was held that the case of a bailiff, the returning officer of an *659] *unincorporated borough, sending Members to Parliament was not within the statute; and Bayley, J., delivering the judgment of the Court, in which all the authorities are reviewed, said, p. 646: "When we consider that the word 'boroughs' in the title of the Act may be satisfied by referring it to the last section, which prohibits the choice of a returning officer for two successive years, and that in that preamble, which introduces the provisions for writs of mandamus and quo warranto informations, we find mention made of the peace, order, and government of the place, with which a bailiff as returning officer has nothing to do, and of burgesses or freemen, which occur only in corporations, we think it impossible to say that it is clear the provisions as to writs of mandamus and quo warranto informations apply to unincorporated boroughs, and on the contrary it appears to us that they apply wholly to *corporate offices in corporate places*."

Edward Beavan, for the relator.—The judgment is warranted by stat. 9 Ann. c. 20, s. 5. The information is in the usual form except that it does not style Bala a town corporate. The defendant, having suffered judgment by default, admits that he exercised or pretended to exercise the office of mayor of Bala, and after that it does not lie in his mouth to say that Bala is not a corporate town. If the defendant had pleaded, and had shown, that there was a real mayor and corporation of Bala, and had obtained judgment, he would be entitled to costs against the relator under sect. 5; therefore the relator when he succeeds ought to be entitled to costs against the defendant. The cases cited in *660] the judgment *in *Rex v. M'Kay*, 5 B. & C. 640 (E. C. L. R. vol. 11), were quo warranto informations for usurping offices which were not corporate offices, with the exception of *Rex v. Richardson*, 9 East 469, which was an information against a portreeve of a borough. The judgment in *Rex v. M'Kay* was that the provisions in the statute as to quo warranto informations apply only to corporate offices; and it was said, p. 646, "there can be no corporate office but in a corporation." But sect. 5 says that where any person or persons shall be "adjudged guilty of a usurpation, or intrusion into, or unlawfully holding and executing any of the said offices or franchises," the Court shall give judgment of ouster against them, and also that the relator recover his costs: that extends to the case in which there is no cor-

poration, but the defendant pretended to hold a corporate office. [KEATING, J.—The information charges that the defendant "exercised the office of mayor of the said town, and, together with Owen Richards and John Jones, the powers and privileges of a body corporate by the name and description of the Mayor and Bailiffs of the Borough of Bala;" and that in that name they demanded and took tolls from persons attending a fair there.]

Vaughan Williams, in reply.—The information ought to show that Bala is a corporate place. [POLLOCK, C. B.—The gist of the decision in *Rex v. M'Kay*, 5 B. & C. 640 (E. C. L. R. vol. 11), is that, under stat. 9 Ann. c. 20, s. 5, the Court has no power to give costs unless the quo warranto information is for usurping a corporate office. BRAMWELL, B.—Sect. 4 says, "in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises;" that means any alleged office of the same description,—it refers to corporate offices. If a man claims to exercise a corporate office, and fails either because it is not a corporate office, or because there is not a corporation, the case is to my mind equally within the Act. WILLIAMS, J.—In *Rex v. Williams*, 1 Burr. 402, 1 W. Bl. 93, which was an information for holding a Court of record, the defendant did not usurp a corporate office; here the defendant pretended to be an officer of a town corporate. BRAMWELL, B.—If the defendant had succeeded, he would have established his title to be an officer of a town corporate, and would have been entitled to his costs against the relator. POLLOCK, C. B.—Suppose the defendant had obtained judgment on the ground that he never had pretended to be mayor of Bala?] He would not have been entitled to his costs. [He cited the observations of Lord Mansfield in *Rex v. Williams*, 1 Burr. 402, 407.]

ERLE, C. J.—I am of opinion that this judgment should be affirmed.

There is a difficulty in distinguishing the present case from some of those in which it was decided that stat. 9 Ann. c. 20, applies only to offices in corporations. But the charge against the defendant in this information is that he usurped the office of mayor of the town of Bala, and, together with two persons named, "the powers and privileges of a body corporate, by the name and description of the Mayor and Bailiffs of the Borough of Bala;" and unless those words had been in the information, I should have agreed with Mr. Williams. The defendant admits that he is guilty of what he is charged with; but he says that he is not within stat. 9 Ann. *c. 20, s. 5, because it only gives costs on informations against persons for usurping corporate offices in corporations. But I think he cannot exempt himself from costs on that ground after he has pretended that there was a corporation and that he was mayor of it. The defendant might have set up as a defence that Bala was a corporate town, and that he had a right to be mayor; and, if he had succeeded, he would have been entitled to costs against the relator, who, before filing the information, must have entered into a recognisance to prosecute the same with effect. And upon this record the relator has incurred costs, which ought to be paid by the defendant.

The statute is certainly much wider than the construction put upon it in *Rex v. M'Kay*, 5 B. & C. 640 646 (E. C. L. R. vol. 11), because

the Court there said that the provisions as to writs of mandamus and quo warranto informations applied to "corporate offices in corporate places," and many well considered decisions have held the same. We do not, on the present occasion, run counter to them.

POLLOCK, C. B.—I agree with what Lord Chief Justice Erle has said; but there is no case which decides that if a person claims to be mayor, and it turns out that there was no corporation, the defendant shall not pay costs. I have a strong impression that the meaning of stat. 9 Ann. c. 20, is that, if a person intrudes himself into an office, and claims it as really existing, he is within the statute, whether there is a corporation or not; so that the Court has power to give costs wherever the real dispute is whether the defendant was entitled to hold a corporate office, his ^{*663]} contention or pretence being that there was a corporation. It would be a great hardship if, when persons under colour of being officers of a corporation, levy tolls and exercise tyranny over the inhabitants of a place, their title could not be questioned by a relator under this statute; and the inhabitants were obliged to wait until the Attorney-General, ex-officio, filed an information against the persons claiming to be a corporation.

WILLIAMS, J.—I also am of opinion that this judgment should be affirmed. I will add one observation. Suppose the defendant had pleaded double, under stat. 32 G. 3, c. 58, first, that he was not mayor, and secondly, that Bala was not a corporation, the Court would have to try whether Bala was a corporation or not, in order to see whether the party who succeeded was entitled to the benefit of the statute of Anne. If, on this information, the defendant is within the statute for one purpose, why should he not be so for the other?

BRAMWELL, B.—The illustration put by my brother Williams shows that on this information the defendant is within stat. 9 Ann. c. 20. Whether a case is within the statute or not, cannot depend on the result of one of the issues.

KEATING, J.—I am of opinion that the present case is within stat. 9 Ann. c. 20, for the reasons pointed out by Lord Chief Justice Erle. Judgment affirmed.

***604] *The QUEEN v. The Justices of SUSSEX. May 14.**

Practice at Quarter Sessions.—Order of removal.—Time for appealing.

An order for the removal of a pauper and his family from the parish of F. to the parish of C. was made on the 18th August, 1860, and notice of chargeability, accompanied by a copy of the order and a statement of the grounds thereof, including the particulars of the settlement relied on, were sent on the 30th August, and a copy of the depositions upon which the order was made were delivered on the 19th September. On the 1st of October notice of appeal to the next Quarter Sessions for the county of S. was given. Those Sessions were held for the Eastern division of that county on the 15th October at A., and for the Western division, within which the respondent parish was situated, on the 18th October at B. The appellants did not, at any time on or before the day and year last aforesaid, send or deliver to the respondents any statement in writing or otherwise of the grounds of the appeal. By the custom and practice of those Sessions, eight days' notice of appeal was required. The appellants applied to the Sessions at B. to receive and enter the appeal, and to respite it to the next Quarter Sessions as matter of right, and without showing any reason for the delay: held, that they had a right to do so, as they had not been guilty of any laches in giving their notice of appeal: per Crompton and Mellor, J.J., dissentient Blackbun, J.

MANDAMUS. The writ: after reciting that, at the Quarter Sessions holden for the county of Sussex, on the 15th October, 1860, the churchwardens and overseers of the poor of the parish of Colemore, in the county of Southampton, applied to the Court to receive, enter and respite an appeal by them against an order of two justices for the removal of John Sandham and his children from the parish of Funtington, in the county of Sussex, to the parish of Colemore, and that the justices at those Sessions refused to permit the appeal to be entered and respite: commanded them to do so, and to hear and determine the merits of that appeal.

Return. That the order of removal was made on the 18th August, 1860: that notice in writing of chargeability, accompanied by a copy of the order of removal and a statement of the grounds of removal, including the particulars of the settlement relied on in support thereof, were, on the 30th of August, sent by the *churchwardens and overseers of the poor of the parish of Funtington, who obtained [*665 the order, to the churchwardens and overseers of the poor of the parish of Colemore, to whom it was directed; and that a copy of the depositions upon which the order was made, having been duly applied for, was, on the 19th September, delivered to them: that on the 1st October the appellants gave notice to the respondents that they intended, at the next General Quarter Sessions of the Peace for the county of Sussex, to commence and enter an appeal against the order: that the General Quarter Sessions of the Peace for the Eastern Division of the county were holden at Lewes on the 15th October, and for the Western Division were holden at Chichester, on the 18th of the same month: that the parish of Funtington is situate in the Western Division of the county: that the appellants did not, at any time on or before the day and year last aforesaid, send or deliver to the respondents any statement in writing or otherwise of the grounds of the appeal: that, by the custom and practice of those Sessions, eight days' notice of appeal against an order of removal and no more is required: that the appellants, at the Quarter Sessions holden at Chichester on the 18th October, applied to have received and to enter the appeal, with a view to its being respite: and thereupon then and there applied to the Court of Quarter Sessions to adjourn and respite the hearing of the appeal to the next General Quarter Sessions of the Peace, as a matter of right, and without showing any cause or assigning any reason for such delay: that the Court decided that the appeal should not be respite, but did not further or otherwise refuse or decline to receive or enter the appeal: that the pauper and his *children were [*666 afterwards removed under and by virtue of that order, &c., and he afterwards died: therefore the justices, &c., declined to receive and enter the appeal, and to hear and determine the merits of the appeal.

Demurrer, and joinder therein.

The demurrer was argued during the Term, on the 26th April; before Crompton, Blackburn and Mellor, JJ.

Manisty (*T. W. Saunders* with him), in support of the demurrer.

Huddleston (*Foot* with him), contra.

The case is exhausted by the judgments; it will be sufficient to add that the following statutes and authorities were referred to during the argument: 13 & 14 Car. 2, c. 12, 8 & 9 W. 3, c. 30, 9 G. 1, c. 7, 4 &

5 W. 4, c. 76, 11 & 12 Vict. c. 31; *Rex v. The Justices of Suffolk*, 4 A. & E. 319 (E. C. L. R. vol. 31), *Reg. v. The Justices of the West Riding*, E. B. & E. 713 (E. C. L. R. vol. 96), *Rex v. The Justices of Surrey*, 1 Mau. & S. 479, *Reg. v. The Justices of Peterborough*, 7 E. & B. 643 (E. C. L. R. vol. 90), *Reg. v. The Inhabitants of Sevenoaks*, 7 Q. B. 136 (E. C. L. R. vol. 58), *Reg. v. Inhabitants of Skircoat*, 28 L. J. M. C. 224, *Reg. v. The Inhabitants of Draughton*, 2 P. & Dav. 224, 8 L. J. M. C. 92, *Reg. v. The Recorder of Derby*, 20 L. J. M. C. 44, *Archb. Poor Law*, p. 761, 10th ed. *Cur. adv. vult.*

And now the Judges, not being able to agree, proceeded to give judgment separately.

*MELLOR, J. (after stating the substance of the writ and re-*667] turn.)—It was urged before us that the Sessions were justified in their decision by the fact, that the appellant parish had been guilty of laches in not giving notice of the grounds of appeal in due time before the Sessions, either “with the notice of appeal,” or fourteen days at the least before the first day of the Sessions at Lewes, or before the 18th October, on which day the Sessions were held at Chichester for the Western division of the county. The latter point was not much pressed, and it appears to me to be the prudent course, in a matter of this kind, to abide by a former decision of this Court in the case of *Reg. v. The Justices of Suffolk*, 16 L. J. M. C. 36, 4 D. & L. 628. The Sessions at Chichester must have been holden by adjournment from Lewes, and in contemplation of law were a continuation of those Sessions, and consequently the 15th, and not the 18th day of October was, for the purpose of computing the fourteen days for giving notice of the grounds of appeal, “the first day of the Sessions.”

The question of laches, as it was put in the argument, is not disposed of by the determination of this point; and it becomes necessary, therefore, to consider the grounds upon which it was contended that there was such laches on the part of the appellants in this case as disentitled them to respite their appeal. It was insisted that the appellants were bound to have given notice of the grounds of their appeal fourteen days at least before the first day of the Sessions, and that if, by reason of their availing themselves of the twenty-one days allowed by sect. 79 of the 4 & 5 W. 4, c. 76, extended by the additional days given by sect. 9 of the 11 & 12 Vict. c. 31, they were too late to give *668] such fourteen days' notice of the *grounds of their appeal, it was owing to their own neglect, and that it followed as of course that they were not entitled to be heard in support of their appeal, and that the Sessions were not bound to respite the same. Upon consideration of the statutes and decisions, I have come to the contrary conclusion.

By the 4 & 5 W. 4, c. 76, s. 79, it was provided that no poor person should be removed or removable until twenty-one days after a notice in writing of his being chargeable, accompanied by a copy of the order of removal and by a copy of the examination upon which such order was made, should have been sent by the officers of the removing parish to the officers of the parish to which such order was directed, with a proviso for the case of earlier submission to the order in manner therein mentioned. It has been in several cases declared that the object of the Legislature, in giving this delay of twenty-one

days in the execution of the order, was to afford opportunity for the parish upon which such order was made to inquire and consider whether they had any sufficient ground of objection thereto: *Reg. v. The Justices of Lancashire*, 4 Q. B. 910, 913 (E. C. L. R. vol. 45). And in *Reg. v. The Justices of the West Riding*, E. B. & E. 718 (E. C. L. R. vol. 96), although under the particular circumstances of that case the Court discharged the rule for a mandamus, Lord Campbell, in delivering the judgment of the Court, said, p. 718, "As a rule, we think that the parties appealing are entitled to take the twenty-one days and the fourteen days mentioned in stat. 11 & 12 Vict. c. 81, s. 9, and that, if, at the expiration of the last of those days, there is time to give *effective* notice of trial of the appeal at the then next Sessions, such notice ought to be given; but that, if there is not time to give such notice of trial, the appeal ought to be entered and *resisted [*669 at the then next Sessions following the expiration of the fourteen days: such an entry and respite will be the only step the appellant can then take to show his intention to prosecute his appeal, as he will do so at the peril of being obliged to pay costs in case he omits further to prosecute it: and this is in accordance with the modern practice." The statute, referred to by Lord Campbell, of 11 & 12 Vict. c. 81, by sects. 1 and 2 substitutes a notice of grounds of removal for a copy of the examination required to be sent with the copy of the order by the Act of 4 & 5 W. 4, c. 76; but, by sect. 8, entitles the officers of the parish to which an order of removal is directed, to apply, within the twenty-one days, for a copy of the depositions; and by sect. 9 extends the period within which notice of appeal must be given to fourteen days after the sending of such copy of the depositions to the officers of the parish so applying for the same. By the 4 & 5 W. 4, c. 76, s. 81, it is enacted that, in every case where notice of appeal against an order of removal shall be given, the officers of the parish appealing against such order shall, "with such notice, or fourteen days at least before the first day of the Sessions at which such appeal is intended to be tried," send or deliver to the officers of the respondent parish a statement in writing under their hands of the grounds of such appeal, "and it shall not be lawful for the overseers of such *appellant* parish to be heard in support of such appeal unless such notice and statement shall have been so given as aforesaid." The statute 11 & 12 Vict. c. 81, s. 4, gives a legislative declaration, if any were wanting, of the object of interchanging the grounds of removal and the grounds of appeal, by reciting as follows: "And whereas a [*670 *statement of the grounds of removal or of appeal is required to be communicated for the purpose of enabling the party receiving it to inquire into the subject of such statement, and, if need be, to prepare for trial:" and, by sect. 11, the Act of 4 & 5 W. 4, c. 76, and that Act are to be construed as one Act.

These provisions enable us to understand the true meaning of the expression, "time to give *effective* notice of trial," used by Lord Campbell in delivering the judgment of this Court in the case of *Reg. v. The Justices of the West Riding*, E. B. & E. 718 (E. C. L. R. vol. 96).

Time to give an *effective* notice of trial of appeal must, I think, be calculated by allowing twenty-one days, with any addition arising

shall have been so given as aforesaid." It is on the true construction of this enactment that I differ from my brothers in the present case.

It seems to me that the intention of the Legislature was to make no difference in the existing law as to notices of appeal, or the time at which the appeal should be entered or heard, but they did intend to attach a condition to the appellants being heard in support of the appeal; and that condition was, that grounds of appeal should have been given, either with the notice of appeal, or at least fourteen days before the trial. The appellants, up to the time of that Act, might give a reasonable notice of appeal, and try at the next Sessions; and it was well known that a week's notice was usually held reasonable within the statute. (See note (a) to 8 Chitty's Statutes, p. 685, 2d ed.) The Legislature did not, it seems to me, intend, and certainly did not use words to express an intention, to take away this power from the appellants, or to enact that a reasonable notice should be fourteen days at least. What they apparently intended, and what the words used in their ordinary sense mean, is, that if the appellants with such notice delivered grounds of appeal, they might be heard. But it was also known that a notice of appeal might be given more than fourteen days before the first Sessions, or might be given too late to try at the first Sessions, so that the appeal *would be entered and respiteed [675] and come on for trial three months and more after the notice of appeal; and it was probably expected that this would in future frequently be the case, as a notice of appeal was by this Act made a suspension of the power of removal if given within twenty-one days. When for these or any other reasons the notice of appeal was given long before the trial, it seems to have been thought unnecessary that the grounds of appeal should be delivered with the notice, and it was provided, as an alternative condition, that the appellants might be heard if the grounds were given fourteen days at least before the first day of the Sessions at which the appeal was intended to be tried, not, it is to be observed, to which the appeal was brought.

I shall afterwards return to this part of this subject, as it is upon it that the difference in opinion arises; but for the present, assuming that the construction is that just stated, I proceed to point out how this becomes material in the present case. Stat. 11 & 12 Vict. c. 31, s. 9, for the first time imposed a limit on the time within which notice of appeal must be given. By that enactment no appeal shall be allowed if notice of appeal be not given within the space of twenty-one days after the notice of chargeability and grounds of removal shall have been sent, unless within that time a copy of the depositions shall have been applied for, in which case a further period of fourteen days after sending of such copy shall be allowed for the giving of such notice of appeal. Sometimes this enactment is spoken of as if it gave to the appellants some additional time within which to bring their appeal, but, in truth, it limits and restricts the time—it does not enlarge it. The appellants are still bound, as before, to bring their appeal to the first practicable Sessions after the grievance; Reg. v. *Inhabitants of Sevenoaks, 7 Q. B. 136 (E. C. L. R. vol. 53); Reg. v. The Justices of Peterborough, 7 E. & B. 643 (E. C. L. R. vol. 90); Reg. v. The Justices of the West Riding, E. B. & E. 713 (E. C. L. R. vol. 96); but formerly the appellants might always

have delayed giving notice of appeal till it was too late to try at that Sessions. The enactment puts a restriction on this power to delay giving notice of appeal. I think that the effect of stat. 11 & 12 Vict. c. 31, s. 9, is that, unless the notice of appeal be given within the prescribed period, the appeal shall not be allowed; but that if the notice be given within the prescribed period the law remains unaltered. The notice may have been given earlier than it would have been if the old option to delay had remained, but I think that the appeal must be tried or respite just as if the notice had (before the Act) been voluntarily given at the same date. If it be a reasonable notice for the next Sessions, the appeal must be tried at those Sessions as heretofore. If the notice is too late for those Sessions, the appeal must as heretofore be entered and respite at those Sessions, and tried at the next Sessions. Assuming for the present that this is the correct view of the statutes, let us see how it applies to the present case.

The supposal of the writ in this case is that, at the Quarter Sessions holden for the county of Sussex on the 15th October last, the offices of the poor of Colemore applied to the Quarter Sessions to receive, enter and respite an appeal against an order of removal from Funtington to Colemore, and the Sessions refused to permit the appeal to be entered and respite. Now, as the Sessions are not bound to enter and respite every appeal when requested so to do, this writ is, I think, defective, *for I take it that the writ ought to show on the face [*677 of it such a state of facts as makes it at least *prima facie* the legal duty of the justices to perform what they were required to do. This objection was not taken on the argument. If it had been, we should no doubt have permitted the prosecutors to amend, by inserting in the writ supposals of those facts which appear on the return, and are admitted by the demurrer to be true, if by so doing the writ would be made good. I shall consider the case as if such amendment had been made, and what appears on the return were inserted in the writ; only recommending the prosecutors, if this case is taken into error, to consider whether it may not be necessary for them to apply for some amendment in the writ to enable them in the Court of error to raise the question. What appears on the return is, that notice of appeal was in fact given on the 1st of October, and that, from the date at which the copy of the depositions was sent, it might have been delayed till the 3d October, and yet not have been too late under 11 & 12 Vict. c. 31, s. 9, and that the first day of the Sessions was 5th October. So that in fact, notice of appeal was given thirteen clear days before the first day of the Sessions, viz., 15th October, and might have been delayed till only eleven clear days before that day. It further appears that by the custom and practice of that Sessions, eight days' notice of appeal, and no more, is required. It further appears that, in this case, no grounds of appeal had been delivered or sent, either with the notice of appeal or at any other time. On this the appellants claimed, as a matter of right, to have the appeal entered and respite. The Sessions refused to respite the appeal, but did not further refuse to enter it. The question intended to be *raised [*678 is whether this is a state of facts on which, by law, the Sessions were bound to enter and respite the appeal. If they had a discretion

at all, judgment cannot be for the Crown even if they exercised that discretion ill.

Now, from what I have already said, I think I have shown that if the notice was a reasonable notice for that Sessions, the justices were not bound to respite. And, before stat. 4 & 5 W. 4, c. 76, s. 81, this certainly would have been a reasonable notice for these Sessions, whether it was given thirteen clear days, or had been delayed till only eleven clear days before these Sessions. But it is equally certain that, if grounds of appeal had been sent with the notice of appeal, they would not have been delivered "fourteen days at least" before those Sessions; and, if the effect of this was to make the trial at those Sessions impossible, it seems to me that it would follow that the notice was not reasonable, and the appeal therefore should have been adjourned; but if, by delivering grounds of appeal with the notice, the appellants could have tried, I do not think they can better their position by neglecting to do so. The words of the statute are, if the appellants shall "with such notice" (of appeal) "OR fourteen days at least before the first day of the Sessions at which such appeal is intended to be tried:" which, as I have already pointed out, seems to me in plain language to give an alternative. I can see no sufficient reason why, in construing this enactment, we should expunge the first part of the alternative, and read it as if it had been enacted simply that the guardians should, fourteen days at least before the first day of the Sessions, deliver the notices of appeal. If this had [679] *been the enactment of the Legislature, the effect would have been that whereas an appellant might, before that Act, have gone to trial at the first Sessions if he gave a reasonable notice (that is, in general an eight day notice), he could not after the statute do so unless he had given grounds of appeal at least fourteen days before the Sessions. This would practically be to say that a reasonable notice should in future be a notice of fourteen clear days; for the cases in which grounds of appeal are delivered before the notice must always be so exceptional that they cannot be supposed to have been in the contemplation of the Legislature: In ea quæ frequentius accident præveniant jura.

If there were any obvious injustice or absurdity produced by giving effect to the language of the Legislature in its ordinary sense we might, perhaps (though it would be a strong measure), construe the statute as if the words "with such notice or" had been introduced by mistake, and were to have no effect whatever; but, considering that the delays in trying appeals were already a crying grievance, we should not strain the language of the Legislature when the effect of so doing would be to interpose a further difficulty in the way of a speedy trial, which I am convinced was not the object of the Legislature.

For these reasons it seems to me that the true construction of the statute is that which I have already expressed. But this is by no means decisive as to the judgment I should give, for I agree that, where there is a decision on a point, a Judge (not sitting in a Court of error), ought to act upon that decision, even if he thinks it a mistaken one. But if there is not a decision on the point, but merely an expression of opinion, not being part of the ratio decidendi,—or as it is generally called, a dictum,—I think it is the duty of a Judge when

he is forming his *opinion to give this dictum its just weight, [*680 but to deliver his judgment according to the opinion which he himself forms, though it is different from that expressed in the dictum. I think also that there are cases in which a mistaken notion of the law has, no matter why, become so generally accepted, and been so acted upon, as to render it probable that business has been regulated, and the position of parties altered in consequence; and in such cases we may hold that the general acceptation of the mistake has made that law which was originally error: *Communis error facit jus:* but then I think that, before we act upon this principle, we ought to see it clearly made out that the error has been commonly accepted, and that the nature of the case is such that parties are likely to have acted upon the mistake and so altered their rights and position. I proceed to inquire whether, on these principles, I am now called upon to put a construction on the 4 & 5 W. 4, c. 76, s. 81, different from that which I think the statute itself bears.

On the argument before us two cases were referred to. These were *Rex v. The Justices of Suffolk*, 4 A. & E. 319 (E. C. L. R. vol. 31), and *Reg. v. The Inhabitants of Draughton*, 2 P. & D. 224, 8 L. J. N. S. M. C. 92. I have not myself been able to discover any other authority bearing on the question; certainly no other was referred to on the argument. It becomes therefore important to see what these cases amount to.

In *Rex v. The Justices of Suffolk*, a notice of appeal to the Quarter Sessions of Ipswich, and with it grounds of appeal, were delivered to the respondents on the 9th October. The appeal ought to have been to the Quarter Sessions of Suffolk. On 18th October, the appellants *corrected their mistake, and delivered a notice of appeal to [*681 the Quarter Sessions of Suffolk. The Quarter Sessions of Suffolk refused to enter the appeal and hear an application to have it respite on the ground of the illness of a material witness, because they thought the notice of appeal defective and informal; and on this a rule nisi for a mandamus to enter continuances and hear the appeal was obtained. The objection urged in showing cause was that the amended notice of appeal was too late, being given less than fourteen clear days before the Sessions. All the Court held that the time for giving the notice was not altered by the statute, and so far the case is consistent with, or rather is in favour of, the view I now support. The Judges further held that the grounds might be sent before the notice of appeal, and that these grounds were good enough and sent in time. There was here a mistake of fact, for it appears that the grounds were sent only thirteen days before the Sessions, and that may perhaps show that the case was not carefully considered; it does not however touch the present case.

Lord Denman expressly says that the enactment was not intended to interfere with the time of giving notice of appeal. "If that had been intended," says he, p. 324, "it would have been expressed;" and Williams, J., says, "There was a timely notice of trying the appeal. The practice, as to that, stands as it did before the Act passed." Coleridge, J., says, p. 325, "Then as to the effect of sect. 81. We are called upon to make a general alteration of practice at Sessions upon a mere implication. The section enacts that a statement of the grounds

*682] of appeal shall be sent or delivered with the notice, or fourteen days at least before the first day of the *Sessions; and therefore it is contended that the notice must be given fourteen days before the Sessions. But the statute itself does not prescribe that, or any time. I asked, when this proposition was stated, 'What time do you say is now fixed for notice of appeal against orders of removal throughout the country?' And no answer was given. The meaning of the clause is that, where the practice of Sessions requires more than fourteen days' notice of appeal, the statement of grounds of appeal may be delivered with the notice, or within not less than fourteen days of the Sessions; but that, at all events, it must be delivered at least fourteen days before the Sessions."

This latter part of his judgment is what the prosecutors in the present case rely upon. Nothing of the sort was said by any of the other Judges, and on the facts no question arose as to the effect of giving grounds of appeal with a notice of appeal less than fourteen days at least before the Sessions. It was therefore a dictum of one Judge only; still, if it had related to any question depending on the general Sessions law, I should have deferred very much to any dictum of Coleridge, J., as he was peculiarly conversant with that branch of law, though I should not have considered it binding on me.

But what he said was with reference to the construction of what was then a new statute, brought before the Court for the first time; and I do not attach the same weight to a hasty expression of his opinion on the construction of the Act on a point not then before him; especially as it seems to have escaped his notice that it was inconsistent with his previous reasoning, as, if the dictum was well founded, the statute by implication did make a great alteration in the *683] practice of all Sessions in which the notice of appeal required was less *than fourteen clear days, that is in a majority of the Sessions in England.

Reg. v. The Inhabitants of Draughton is not reported in Adolphus & Ellis. It is reported in the 8 Law Journal, N. S. M. C., and in Perry & Davison. In neither report does it appear what the state of facts was on which the Court had to decide. But I have obtained the case from the Record Office, and I find the facts to be these. The appellants gave a notice of trial of an appeal previously entered and respited. On the same paper, and as part of it, the appellants gave their grounds of appeal. This appears by the notice of appeal returned with the certiorari, and now in the Record Office. On the trial of the appeal, the appellants being called upon to prove their notice of appeal, proved the service on the 19th March, 1838. It was thereupon objected that such notice was not in time, for that it was not given fourteen days at least before the first day of the Sessions, which were held on the 2d April, 1838. The Sessions decided in favour of the appellants, which, on my view of the law, was right, and on the other view was wrong; but, subject to a case in which the only question was, "whether such notice was given in time pursuant to 4 & 5 W. 4, c. 76, s. 81." No question was in terms asked as to whether, supposing the notice right, the grounds of appeal ought not to have been delivered at least fourteen days before the Sessions; whatever might be the case as to the notice. The reason probably was, that

the Quarter Sessions thought (as I do) that, if the notice itself was good, the words of the statute were express that the grounds might be given with the notice. The Court of Queen's Bench affirmed the order of Sessions. The terms in which the point was reserved and the question *asked prevent the decision from being fairly citeable as confirming the propriety of what was done by the Quarter Sessions in hearing the appellants, though the grounds of appeal had not been delivered fourteen days at least before the Sessions; for it is not impossible that the Court might have thought the decision of the Quarter Sessions wrong, and yet have held that, from the way in which the case was reserved, their decision must be affirmed; but, the facts show, very decidedly, that no point arose before the Court on which they could decide that the grounds of appeal were not given in time. If any expressions of such an opinion were used, it must have been without perceiving that in effect they were saying that the decision which they affirmed ought not to have been come to. I think I am justified in treating any such expression as being merely a repetition of the dictum of Coleridge, J., made without consideration, and not adding much weight to it as an authority, and certainly not binding as a decision.

I have not myself been able to find any other case in which this point was alluded to, nor has any such been cited on the argument, nor I believe has any such authority been found by either of my brothers. I have not myself found any grounds for believing that the opinion thrown out in these two cases has been in practice commonly adopted. As far as the text books are concerned: in Archbold's Poor Law, p. 765, 10th ed., the rule is laid down in the way contended for by the prosecutors, and Reg. *v.* The Inhabitants of Draughton is cited as the authority; but in Steer's Parish Law, 735-6, 8d ed., the rule is laid down in the terms of the statute: I do not know why we are to suppose the one expresses the general opinion more than the other.

*The result I come to is, that I think that, as the law stands, the appellants may, if they please, delay their notice to the extreme limit left by stat. 11 & 12 Vict. c. 31; but that, if the notice be then a reasonable notice for the next Sessions according to the practice of the Sessions, though that be less than fourteen clear days before the Sessions, the appeal must be tried at those Sessions (subject to the power of the Sessions to postpone the trial for cause); and that the appellants cannot gain to themselves a right to adjourn the trial by omitting to deliver the grounds of appeal in time for that Sessions, which they may effectually do by delivering them with the notice. But if the appellants can delay the notice till it is too late for the next Sessions, the old law remains unaltered,—they may do so,—and then however unreasonable their delay may have been, the Sessions must adjourn the appeal. In the present case the appellants have not and could not have delayed their notice of appeal till it was too late to try at those Sessions, and therefore in my opinion the Sessions were not bound to adjourn the appeal.

I therefore think that judgment should be for the defendants.

CROMPTON, J.—It appears from the dates and facts stated upon this record, which my learned brothers have referred to, that the appellants,

at the expiration of the period of twenty-one days, extended by the application for the copy of the depositions, were in time, according to the practice of the Sessions, to give their notice of appeal, which they accordingly did give, but were not in time to give fourteen days' notice of grounds of appeal. They therefore applied to the Sessions *686] to enter and *respite, which the Sessions refused to allow; and if the appellants were entitled to have their appeal entered and respite, the Sessions ought to be commanded to enter continuances and hear the appeal.

Upon the argument before us the point most relied upon by the counsel for the defendants was, that the appellants had been guilty of laches, and might, if they pleased, have applied for and got the depositions earlier, and, at all events, might have given their grounds of appeal without taking the whole of the twenty-one days extended by applying for the depositions; and therefore that this was like the cases where it has been held that the parties were bound to enter and try unless the Sessions, in their discretion, allowed an adjournment.

Another point was taken, but not much relied on apparently by the appellant's counsel, that as the stat. 4 & 5 W. 4, c. 76, s. 81, says that the notice of the grounds of appeal shall be sent with the notice of appeal, or fourteen days at least before the first day of the Sessions at which the appeal is intended to be tried, the appellants were in time to give the notice of their grounds of appeal with the notice of appeal; and that, if given with the notice of appeal, it need not be given fourteen days before the first day of the Sessions, and therefore that the appellants were in time to give effective notice of the grounds of appeal, so as to enable them to try.

With regard to this point, which is, I believe, the only matter as to which my brother Blackburn differs from us, I am of opinion that we ought to hold that the grounds of appeal must be given fourteen days at least before the first day of the Sessions, whether such notice be given with the notice of appeal or separately. I think that we are *687] bound, in this Court at all events, to follow the *construction which was put upon the enactment in question immediately on the Act passing (*contemporanea expositio*), and expressly confirmed by the Court in one or more other decisions; and after those decisions, as far as I can find, never doubted by the Court in any of the cases up to the present time; and which construction has been treated in books of practice as regulating, and has in point of fact regulated, as I believe, the practice of Sessions. I think that disturbing such decisions and practice is peculiarly mischievous in cases of Sessions practice. (See Reg. v. The Justices of Shropshire, 8 A. & E. 173 (E. C. L. R. vol. 35), where the Court felt themselves bound by a single prior decision on a similar question, though against the opinion of all the Judges, each of whom would, if the point had been a new one, have put a different construction on the Act in question from that which they felt themselves bound to adopt.) I cannot help thinking that the construction of the Court really carried out the intention of the Legislature; and that if a different construction had been put by the Court upon the enactment in question, it would in all probability have been remedied by the Legislature in subsequent Acts on the same subject-matter. I cannot agree with my brother Blackburn, that it is a suf-

ficient reason for now disturbing the law on the subject that the words admit of another construction, even if we thought that we should have adopted such other construction of it had been *res nova*; neither do I think it a sufficient reason for our holding ourselves not bound by the decisions of our predecessors, that on examining the papers in the cases it may appear that the Court may have *mistaken the [*688 facts, and that if they had taken another view of the facts the question might not have arisen.

It became necessary for this Court, immediately after the passing of the 4 & 5 W. 4, c. 76, to put a construction upon the provisions of the 81st section.

The statement of the grounds of appeal was obviously required, as is indeed expressly recited in the 11 & 12 Vict. c. 4, s. 31, s. 4, for the purpose of enabling the party receiving the same to inquire into the subject of such statement, and to prepare for trial. The grounds are in the nature of pleadings; and it would *prima facie* seem that the Legislature would probably fix one general rule for the time which should be given for such inquiry and preparation throughout the country.

The time for giving notice of appeal having been different at different Sessions, it seems to have been thought that the effect of the enactment 4 & 5 W. 4, c. 76, s. 81, was to make the notice for the Sessions throughout the country the same. And this view was presented to the Court in the case of *Rex v. The Justices of Suffolk*, 4 A. & E. 319 (E. C. L. R. vol. 35), which occurred in the year after the passing of the Act. It was there argued that as the clause required fourteen days at least, and as the notice might be given with the notice of appeal, the notice of appeal must be a fourteen days' notice. The Court, however, clearly assuming that the notice of grounds of removal must be a fourteen days' notice, say that it is distinct from the notice of appeal, and may be given with it if the notice of appeal is given, as it may be, before the fourteen days; and Mr. Justice Coleridge expressly says, p. 325, "The meaning of the clause is that, where the practice of Sessions requires more than fourteen [*689 "days' notice of appeal, the statement of grounds of appeal may be delivered with the notice, or within not less than fourteen days of the Sessions; but that, *at all events, it must be delivered at least fourteen days before the Sessions*. This was not a mere *obiter dictum*, but was the very *ratio decidendi*. The decision was, that though the provision as to the fourteen days at least is a general rule as to the GROUNDS of appeal, it does not affect the notice of appeal, which is distinct, and left untouched by the statute. The notices being distinct, it was not necessary to hold that the general rule as to the fourteen days was to apply to the notice of appeal.

Mr. Justice Coleridge, a very great authority as to Sessions law, is expressly construing the statute in a case where it was necessary to construe it. I think the construction carried out the intention of the statute, as it seems very unlikely that the Legislature could have intended that the time allowed to the respondents for inquiry and preparation should be different, and fluctuate with the time allowed by the practice of the Sessions at different places. Though the time for giving notice of appeal is untouched by the statutes, and is still regu-

lated by the practice at the particular Sessions, the twenty-one days and the fourteen days mentioned in the 4 & 5 W. 4, c. 76, and the prolonged period of fourteen days in the 11 & 12 Vict. c. 31, all seem to me to be general regulations to force the appellants, in the words of Erle, J., in *Reg. v. The Justices of Peterborough*, 7 E. & B. 643, 650 (E. C. L. R. vol. 90), "to take definite steps within definite times." The words of the enactment in question are not perhaps well chosen, but I do not think that it is so violent a construction as my brother [690] Blackburn appears to suppose to construe them as meaning that *the notice may be given with the notice of appeal or at some other time (which it obviously means), but that in either case it must be *fourteen days at least before the first day of the Sessions*.

It has been suggested that the dictum in *Rex v. The Justices of Suffolk*, 4 A. & E. 319 (E. C. L. R. vol. 81), was the mere dictum of Mr. Justice Coleridge: but we find in the next case, *Reg. v. The Inhabitants of Draughton*, 2 P. & Dav. 224, 8 L. J. M. C. 92, which occurred four years after *Rex v. The Justices of Suffolk*, that the full Court of Queen's Bench, consisting of Lord Denman and Justices Littledale, Patteson and Williams, were expressly asked to reconsider the case of *Rex v. The Justices of Suffolk*, and that the Court had again to put a construction on the clause in question; and Lord Denman, with the concurrence of the other Judges, states as the judgment of the Court, as reported in the Law Journal, that "The Act leaves the time for the notice of appeal, as it was before; but, should the notice" (that is the notice of appeal) "not be delivered fourteen days before the Sessions, the grounds *at least* must have been. There is no occasion for our overruling *The King v. The Justices of Suffolk*." This is a distinct decision on the construction of the words in question. In the report in *Perry & Davison*, Lord Denman's judgment is thus given: "The implication contended for is not at all necessary." That is the implication that, as the notice of grounds of appeal must be fourteen days, the notice of appeal must also be so. He proceeds to give the reason of the decision, and says, "Notice of appeal may by the practice in some places be required more than fourteen days before the Sessions, in which case the grounds of appeal [691] may be sent with the notice; *in other cases, where so long a notice is not required, the alternative is provided, that the grounds of appeal should be sent to the respondents fourteen days before the Sessions. There is no provision as to the time of notice itself." Littledale, Patteson and Williams, Justices, concurred. In *Reg. v. The Justices of Lancashire*, 4 Q. B. 910 (E. C. L. R. vol. 45), decided two years after *Reg. v. The Inhabitants of Draughton*, Lord Denman says, p. 913, "If they appeal, they must, by sect. 81, give fourteen days' notice of the grounds of appeal."

In later cases, where the question has been as to whether the appellants, not having had time to give the fourteen days' notice of grounds of appeal, although they had had time to give notice of appeal, and where it has been decided that the party was still obliged to give his notice of appeal, and was then to enter and respite as not having had time to give effective notice of grounds of removal, I do not find that the Court has ever expressed any doubt with regard to the correct-

ness of the decisions as to the fourteen days being required to be given.

I think that this state of the authorities fully justifies the statement of the practice in this respect, as laid down in the last edition of Archbold's Poor Law, p. 761, as follows: "These times are given that the parish served may have an opportunity to consider whether they will appeal or not. They have then to consider whether a sufficient time remains to them to give the notice of appeal (eight, ten, or fourteen days, &c.), required by the practice of the particular Sessions to which the appeal is to be, and also to serve notice of grounds of appeal, *which latter must be served fourteen days at least before the first day of the Sessions.* . . . If they have *time to serve their notice and grounds of appeal after the twenty-one and fourteen days [*692 above mentioned, they must enter and try their appeal at the next Sessions; if they have not time for these or either of them, they must enter and respite their appeal at the next Sessions, and try it at the next following Sessions." This is quite consistent with the rule of practice as laid down by Lord Campbell in the recent case of *Reg. v. The Justices of the West Riding*, E. B. & E. 713 (E. C. L. R. vol. 96), to which I shall have hereafter to refer. I cannot help thinking therefore that the counsel for the respondents was right in not laying much stress upon this point, as I think he must have been aware of the practice in this respect, and; notwithstanding the respect I always entertain for my brother Blackburn's opinion, which alone has induced me to go into a matter of this kind at such length; I think that, sitting here, we ought to adhere to the practice as settled by our predecessors, and that if such practice is to be unsettled it should be done only by those who have authority to correct the judgments of this Court.

Upon the other and main point, made by Mr. Huddleston, I felt at one period very considerable doubt. He argued that as, by recent cases, the practical time for appealing was to have reference to the order of removal, and that as the party, if he had had a reasonable time for giving notice of appeal, was held guilty of laches in not entering his appeal, the appellants in the present case might have given their notice of grounds of removal in time, and were therefore not entitled to respite. On examining the cases in question, however, I quite agree with my brother Mellor, and I am not aware that on this part of the case there is any difference of opinion *in the Court [*693 in thinking that there is no laches in the party taking the whole of the twenty-one and fourteen days, and not giving notice of grounds of removal before. He is to have time to make out his case and state his pleadings, and though, for the reasons given in the recent cases, it is held that the practicability of the Sessions for the purpose of the *appeal being entered* is to be looked at with reference to the order of removal, yet the question of the practicability of trial is to be looked at with reference to the time at the expiration of the twenty-one and fourteen days; and it is clearly assumed in all these cases; *Reg. v. The Inhabitants of Sevenoaks*, 7 Q. B. 136 (E. C. L. R. vol. 53), *Reg. v. The Justices of Peterborough*, 7 E. & B. 643 (E. C. L. R. vol. 53), and *Reg. v. The Justices of the West Riding*, E. B. & E. 713 (E. C. L. R. vol. 96); that the party need not give his notice of grounds

of removal until after the expiration of the limited time, and that though he is bound in such a case as the present to enter his appeal, he is not bound, nor can he indeed with reference to the other party, try his appeal. The cases taken together clearly establish that, if the time for giving notice of appeal is practicable, the appellant, by taking the whole time, does not relieve himself from entering his appeal, but must enter; and if there has not been time to give notice of grounds of appeal at the end of his limited time, he must still enter and respite.

The object and effect of these decisions is very beneficial. By compelling the appellant to enter his appeal they prevent the great mischief of the respondents being led to suppose that the appeal is abandoned, but at the same time they expressly take care that the *694] appellant *shall have his whole time to give his notice of grounds of removal.

The result of these cases is stated by Lord Campbell, in the recent case of *Reg. v. The Justices of The West Riding*, E. B. & E. 713 (E. C. L. R. vol. 96), in a way that seems to me decisive of this question. He says, in delivering the considered judgment of the Court in that case, p. 718: "As a rule, we think that the parties appealing are entitled to take the twenty-one days and the fourteen days mentioned in stat. 11 & 12 Vict. c. 31, s. 9, and that, if, at the expiration of the last of those days, there is time to give effective notice of trial of the appeal at the then next Sessions, such notice ought to be given; but that, if there is not time to give such notice of trial, the appeal ought to be entered and respite at the then next Sessions following the expiration of the fourteen days: such an entry and respite will be the only step the appellant can then take to show his intention to prosecute his appeal, as he will do so at the peril of being obliged to pay costs, in case he omits further to prosecute it: and this is in accordance with the modern practice. In the present case we think that the determination of the Sessions was right, and that the rule for a mandamus should be discharged."

In the case now before us the appellants appear to me to have followed the exact practice as laid down by this Court, and declared, I believe most correctly, by them, to be "in accordance with modern practice." They were bound, according to these decisions, to enter their appeal; they were not bound to try and could not, after taking the time given by the Legislature, force the respondents to try. And their only other course was to enter and respite, which they applied *695] to do in conformity with *the exact course pointed out by this Court; and the Sessions were, I think, therefore, bound to allow them to enter and respite their appeal, and were wrong in refusing to allow them to do so.

Another point was made, which clearly does not however appear to me to arise upon the record as at present framed:—it was said that there was time, at the expiration of the extended time, to give notice of grounds of appeal for the adjourned Sessions in that division of the county where the appeal was intended to be tried.

If we were at liberty to go into that question, doubts might well be entertained whether the notice for such adjourned Sessions might not be sufficient. This, however, was decided to the contrary, in the

case of *Rex v. The Justices of Surrey*, 1 Mau. & S. 479, which ought, I think, to be considered as conclusive upon us in a matter of this kind; and I should not have mentioned this point except for the note in the case of *The Queen v. The Justices of Lancashire*, 4 Q. B. 910, 913 (E. C. L. R. vol. 45), from which it might be supposed that the question was in some respect open, so that it might possibly be thought worthy of consideration if the case goes farther, and the matter can be made to appear upon the record.

I should add, that I quite agree with what my brothers have said as to our deciding this matter without reference to the form of the writ of mandamus. No objection having been made in this respect, I think that we should decide the matter on the points taken before us. If any such objection to the form of the writ had been taken, we should have allowed the writ to be amended.

It may possibly be thought, especially since the Act *allowing a writ of error in the case of a return to a mandamus and pleadings thereupon, that it is not sufficient generally to order the justices to do the act required, but that the writ should show a clear legal right. This seems certainly to be the case as to many writs of mandamus, where the supposal of the writ ought to show matters clearly sufficient to warrant its issuing. There may be doubt how far the writ may be in so general a form as the present, even in cases where the Court are exercising their peculiar jurisdiction of controlling the exercise of the functions of inferior tribunals, and where they have been said to have a jurisdiction of a visitatorial character; per Lord Ellenborough, in *Rex v. The Justices of Wiltshire*, 10 East 404, 406; and where they may be supposed to have satisfied themselves *prima facie*, in the exercise of such jurisdiction, that the writ ought to issue. No doubt the writ may be very general, and, if *prima facie* sufficient, the general and correct rule is that the return must state conclusively matter which shows why the parties do not obey it, but in the present case it would seem more proper to have alleged the facts and dates that give the alleged right.

If the matter goes farther than this Court, we think that the parties should respectively have leave to make such amendments as raise the real points argued before us.

My brother Mellor concurring with me in thinking that the prosecutors are right as to the matters brought before us, we give our Judgment for the Crown.

*CRIPPS v. HARTNOLL. May 14.

[*697]

Statute of Frauds, 29 Car. 2, c. 3, s. 4.—Recognisances in criminal case.

1. A., at the request of B., entered into recognisances for the appearance of B.'s daughter at the Central Criminal Court, to which she had been committed to take her trial, on a charge of misdemeanor; and B., in consideration thereof, agreed to indemnify A. against all liability, and from all costs, damages and expenses in respect to the same. B.'s daughter not having appeared according to the recognisances, they were estreated, whereby A. was obliged to pay the amount, and incurred other expenses: held, that this was a special promise to answer for the debt, default or miscarriages of another person, within the Statute of Frauds, 29 Car. 2, c.

3, s. 4, and, as such, could not be sued on without an agreement or memorandum or note in writing.

2. *Quare*, whether, in order to bring a case within sect. 4 of the Statute of Frauds, 29 Car. 2, c. 3, the debt or default must be towards the promisee?

THE first count of the declaration stated that one Sarah Elliott, the daughter of the defendant, had been committed by the magistrates of the Westminster Police Court to take her trial before Her Majesty's Justices of the Central Criminal Court, on, &c., then and there to plead to an indictment against her for a misdemeanor, and to be further dealt with according to law; and, being so committed, the defendant requested the plaintiff to become bail for her, and to enter into certain recognisances for 80*l.* for her appearance at the Central Criminal Court; and the defendant agreed, in consideration thereof, to indemnify the plaintiff against all liability in respect thereof, and from all costs, damages, and expenses in respect to the same. It then averred that the plaintiff did become bail for Sarah Elliott, and did enter into the recognisances; and that he did all things, and all things happened, and all times elapsed necessary to entitle him to be indemnified by the defendant; and that Sarah Elliott did not appear before Her Majesty's justices at the Central Criminal Court according to the recognisances, whereby the same became estreated; and the plaintiff [698] was forced and obliged *to pay, and did pay, the said sum of 80*l.*, and also paid and incurred costs, charges, and expenses to the amount of 20*l.*, and was otherwise damned: whereof the defendant had notice, but did not indemnify the plaintiff therefrom.

There was another special count, on which, however, nothing turned.

There were also counts for work done, for money paid, and on accounts stated.

The defendant pleaded, to the first count, a denial of the agreement alleged, and also payment: to the common counts, as to 40*l.*, parcel, &c., payment into Court; and to the remainder, never indebted, and payment.

The plaintiff took the 40*l.* out of Court, and joined issue on the other pleas.

On the trial, before Hill, J., at the Sittings at Guildhall, in Trinity Term, 1861, it appeared that the plaintiff, at the request of the defendant, who agreed to indemnify him, had become bail in the sum of 80*l.* for the appearance of the defendant's daughter, who had been committed by the magistrates of the Westminster Police Court to take her trial at the Central Criminal Court for a misdemeanor. She, however, did not appear, in consequence whereof the recognisances were estreated, and the plaintiff was compelled to pay the 80*l.*; and he now sought to recover in respect of this and the other expenses, &c.

On the part of the defendant it was objected that the case came within the stat. 29 Car. 2, c. 3, s. 4, which enacts that "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized;" and con-

sequently, as no agreement, memorandum or note in writing was produced, the plaintiff could not recover. The Judge being of this opinion nonsuited the plaintiff, reserving to him leave to enter a verdict.

A rule nisi accordingly was obtained in Easter Term, 1861, which was argued in the last Term, on the 10th May; before Crompton, Blackburn and Mellor, JJ.

W. D. Seymour and *Archibald* showed cause.—This case is expressly within the decision in *Green v. Cresswell*, 10 A. & E. 453 (E. C. L. R. vol. 37), where, a writ having been issued against H. at the suit of R., the plaintiff entered into a bail bond for H., in consideration of which the defendant promised to indemnify the plaintiff against the consequences. The bail bond having become forfeited, the plaintiff sued on the above agreement, but it was held that the case came within 29 Car. 2, c. 3, s. 4, and as there was no agreement, memorandum or note in writing, the plaintiff could not recover. That case is cited with approval in note (l) to *Forth v. Stanton*, 1 Wms. Saund. 211 c, 6th ed. [CROMPTON, J., referred to *Jones v. Orchard*, 16 C. B. 614 (E. C. L. R. vol. 81).] (They were then stopped.)

H. James, in support of the rule.—*Green v. Cresswell* is not law, and, if it were, is distinguishable from the present case. *Eastwood v. Kenyon*, 11 A. & E. 438 (E. C. L. R. vol. 39), is an authority that sect. 4 of 29 Car. 2, c. 3, contemplates only promises made to the person to whom another is liable; *and therefore that a promise [*700 by A. to B. to pay C. a debt due from B. to C., is not within that section. In Smith's Mercantile Law, 467 note (q), 6th ed., the cases are considered, and the author says, "I have only further to observe, that the opinion expressed by the Court in *Eastwood v. Kenyon* may, perhaps, be thought to diverge somewhat in principle from the decision in the prior case of *Green v. Cresswell*." [BLACKBURN, J.—Looking at that note it rather suggests that *Green v. Cresswell*, 10 A. & E. 453 (E. C. L. R. vol. 37), is right and *Eastwood v. Kenyon*, 11 A. & E. 438 (E. C. L. R. vol. 39), is wrong.] The note to *Birkmyr v. Darnell*, in 1 Smith's Leading Cases, p. 264, 5th ed., after citing *Eastwood v. Kenyon*, says, "This view, which would limit the generality of the rule laid down by Serjeant Williams, and seems not altogether reconcilable with the doctrine in *Green v. Cresswell*, has been recognised and acted upon by the Court of Exchequer, in *Hargreaves v. Parsons*, where it is laid down, that 'the statute applies only to promises made to the persons to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person towards the promisee.'" The judgment in *Hargreaves v. Parsons*, 13 M. & W. 561, 570, goes on to say, "This was decided, and no doubt rightly, by the Court of Queen's Bench, in *Eastwood v. Kenyon*, and in *Thomas v. Cook*, 8 B. & C. 728 (E. C. L. R. vol. 15)." If *Green v. Cresswell* is right, it almost overrules the last-mentioned case. [MELLOR, J.—In the note which you have just cited, *Green v. Cresswell* is said to be in accordance with *Tomlinson v. Gell*, 6 A. & E. 564 (E. C. L. R. vol. 33). It is also recognised as good law in *Chitty Contr.* 452, 454, 6th ed.] In **Batson v. King*, 4 H. & N. 739, Pollock, C. B., says, p. 740, "If a man says to another, 'If you will at my

request put your name to a bill of exchange I will save you harmless,' that is not within the statute. It is not a responsibility for the debt of another. It amounts to a contract by one, that if the other will put himself in a certain situation the first will indemnify him against the consequences. In *Green v. Cresswell*, Lord Denman pointed out a distinction between that case and one where the defendant is a co-surety. I do not think that the case itself was rightly decided." In *Brittain v. Lloyd*, 14 M. & W. 762, Pollock, C. B., in delivering the judgment of the Court, says, p. 773, "It is clear, that if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying from him at whose request it is paid, and may be recovered on a count for money paid; and it is wholly immaterial whether the money is paid in discharge of a debt due to the stranger, or as a loan or gift to him. . . . The request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference. If one ask another, instead of paying money for him, to lend him his acceptance for his accommodation, and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill, nor in any way liable to the person who ultimately receives the amount. The borrower, by requesting the acceptor to assume that character [which *ultimately obliges him to pay, impliedly requests him to pay, and is as much liable to repay, as he would be on a direct request to pay money for him with a promise to repay it. In every case, therefore, in which there has been a payment of money by a plaintiff to a third party, at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount, this form of action is maintainable." In *Fitzgerald v. Dressler*, 7 C. B. N. S. 374 (E. C. L. R. vol. 97), Williams, J., says, p. 385, "The statute only applies where the promise is made to the person entitled to the money." The present case is further distinguishable from *Green v. Cresswell*, 10 A. & E. 453 (E. C. L. R. vol. 37), in this, that in that case there was no count for money paid.

Cur. adv. vult.

The judgment of the Court was now delivered by

CROMPTON, J., who said that, without expressing any opinion as to what might be the judgment of a Court of error on the decision in *Green v. Cresswell*, this Court was bound by that decision. If that case was law, the distinction between it and the present, that the one arose on a bail bond in a civil suit and the other on recognisances for the appearance of a person in a Criminal Court, was immaterial. Neither was it necessary to consider the point whether in order to bring a case within the 4th section of the Statute of Frauds, 29 Car. 2, c. 3, the debt or default must be towards the promissee, as that point was taken and decided in *Green v. Cresswell*, 10 A. & E. 453 (E. C. L. R. vol. 37). For these reasons the nonsuit was right, and the present rule must be discharged.

Rule discharged.

*IN THE EXCHEQUER CHAMBER.

[*703]

The QUEEN v. The Burial Board for the Parishes of ST. JOHN, WESTGATE, and ELSWICK, in the Borough and County of NEWCASTLE UPON TYNE. May 14.

18 & 19 Vict. c. 128, s. 18.—*Closed burial ground.—Repair.*

Stat. 18 & 19 Vict. c. 128, s. 18, which enacts that in every case in which any order in council is issued for the discontinuance of burials in any churchyard or burial ground, the Burial Board or Churchwardens shall maintain such churchyard or burial ground of any parish in decent order, and also do the necessary repair of the walls and other fences thereof, and the expenses shall be repaid by the overseers, upon the certificate of the Burial Board or Churchwardens, out of the poor rate of the parish or place in which such churchyard or burial ground is situate, unless there shall be some other fund legally chargeable with such expenses, does not apply to burial ground which is not a burial ground of any parish, but is the property of private persons: affirming the judgment of the Queen's Bench.

JUDGMENT having been entered for the defendants in the Court below, upon demurrer to the return to the mandamus in this case (see vol. 1, p. 679), the prosecutors brought error.

T. Jones (Northern Circuit), for the prosecutors.—First. The obligation imposed on the public by sect. 18 of The Burial Act, 18 & 19 Vict. c. 128, to maintain burial grounds in decent order, and keep the walls and fences in repair, extends to all burial grounds closed by order in council. [BRAMWELL, B.—If a private burial ground is closed, the proprietor might use that part in which there had been no burials as his private property.] Not if it was closed by order in council, and repaired at the public expense. The order in council would be an assumption of authority over it, and prevent the future acquisition of *profit from it. The scope of the Act is to give [*704] the Crown, for sanitary purposes, a discretion to close any burial grounds, and after they are closed to keep them from desecration. The true rule in construing statutes is not to confine the operation of the enactment within any special words in it, if the general intent shows that those words are redundant. Here sect. 18 enacts “in every case in which any order in council has been or shall hereafter be issued for the discontinuance of burials in any churchyard or burial ground, the Burial Board or churchwardens, as the case may be, shall maintain such churchyard or burial ground of any parish in decent order,” &c. Construing this enactment by the above rule, the words “of any parish” are redundant; and then the section applies to any burial ground in a parish: or, the words “of any parish” may be read with “churchwardens,” the intermediate words being put in a parenthesis. The section provides for two classes of burial grounds: first, those which are under the care of the churchwardens; and secondly, places for public interment such as this, not belonging to the parish. [ERKE, C. J.—Otherwise the burial grounds of dissenters would be excluded from the section.]

Secondly. The liability to maintain this burial ground in decent order and repair its fences was upon this joint Burial Board. Any number of parishes may concur in providing one common burial ground, and then the Burial Boards appointed for such parishes form one joint Burial Board. [He referred to stat. 15 & 16 Vict. c. 85, ss.

23, 24, and 24 & 25 Vict. c. 61, s. 21; and was then desired by the Court to reserve his further argument on this question.]

*705] *Mellish, for the defendants.—On the first point. Sect. 18 of stat. 18 & 19 Vict. c. 128, does not apply to a burial ground which is the property of private individuals. The Court cannot reject the words “of any parish.” Every parishioner has a right to be buried in the churchyard; whereas the return states that this burial ground is the property of certain private persons, and that fact must be taken as admitted on the record. [BRAMWELL, B.—Suppose a writ issued to fence this burial ground, and the proprietors brought an action of trespass quare clausum fregit against the Burial Board?] Or suppose the proprietors did not like the fence and pulled it down, what remedy would there be against them? [ERLE, C. J.—That reasoning would apply to the burial grounds of dissenters.] Throughout the legislation upon this subject a distinction has been made between parochial burial grounds, which cannot be devoted to any other purpose, and non-parochial burial grounds. [He referred to stat. 16 & 17 Vict. c. 134, ss. 2, 5.] If the parish wish that this burial ground should be maintained in decent order, and its fences be repaired at the public expense, the vestry may purchase it under sect. 8 of stat. 20 & 21 Vict. c. 81.

ERLE, C. J.—This is a mandamus directed to the joint Burial Board for the parishes of St. John, Westgate, and Elswick, in Newcastle upon Tyne, to maintain a burial ground, situate in the township of Westgate, in decent order, and do the necessary repairs of the walls and fences thereof. It appears from the return to the mandamus that this burial ground is not the burial ground of any parish, but belongs to private persons.

*706] The words of sect. 18 of stat. 18 & 19 Vict. c. 128, are perfectly distinct, and show that the duty of the Burial Board is confined to maintaining the burial ground “of any parish;” and this is not such a burial ground.

I was at first persuaded by the argument of Mr. Jones that the intention of the Legislature was to provide for maintaining the fences of all burial grounds in which burials should be discontinued by order in council. But I am now satisfied that such was not the intention. The section enacts that “in every case” in which an order in council is issued for the discontinuance of burials in any churchyard or burial ground the Burial Board or Churchwardens shall maintain such churchyard or burial ground “of any parish”—not “every churchyard or burial ground in which burials are discontinued.” Mr. Jones argued that the words “of any parish,” which are clearly illogical as the sequence to the first part of the sentence, might be rejected as insensible, or that they might be transposed so as to be read with the word “churchwardens.” But that is the ultima ratio when an absurdity would follow from giving effect to the words of an enactment as they stand. If section 18 applied to this burial ground, which is admitted on the record to be a private burial ground, there would be so far a violation of the rights of private property. Moreover, when I refer back to the original statute for discontinuing old burial grounds and providing others, I find a distinction made between parochial and non-parochial burial grounds; and in the subsequent statute

that distinction appears to have been well before the mind of the Legislature ; and therefore I infer that when this section was in terms limited to maintaining the burial ground "of any parish," those words were inserted purposely.

*For these reasons I think I give effect to the intention of the Legislature, and I am certain I give effect to the words used by them, by affirming the judgment of the Court of Queen's Bench.

POLLOCK, C. B.—I am of the same opinion, for the reasons assigned by the Lord Chief Justice Erle.

BRAMWELL, B., and KEATING, J., concurred.

Judgment affirmed.(a)

(e) Before the argument commenced, a question was made whether the Court should sit with four Judges only.

Hollis observed that the case in the Court of Queen's Bench was decided by three Judges.

ERLE, C. J.—That is a reason for hearing the case in this Court with four Judges only.

The Master, *Sir Archer Croft*, said that the number of Judges necessary to form the Court was not fixed.

MEMORANDUM.

In this Vacation, Michael O'Brien, Esq., and Frederick Lowten Spinks, Esq., were advanced to the degree of the coif, when they gave rings with the motto "Aliud nobis est agendum."

END OF EASTER VACATION.

CASES

ARGUED AND DETERMINED

■■■

THE QUEEN'S BENCH,

■■■

Trinity Term,

XXV. VICTORIA. 1862.

The Judges who usually sat in Banc in this Term, were,—

COCKBURN, C. J.,
WIGHTMAN, J.,

CROMPTON, J.,
BLACKBURN, J.

The NEWPORT Dock Company, Appellants; The Local Board of Health for the District of the Borough of NEWPORT, in the County of MONMOUTH, Respondents. June 4.

Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 55.—Rating of dock, adjuncts, and railways.

The Newport Dock Company, incorporated under stat. 5 & 6 W. 4, c. lxxv., were the owners and occupiers of a dock for the reception of ships, with quays, warehouses, cranes, weighing machines and other works, and also of railways or tramroads for transporting traffic to and from the dock, and communicating with their warehouses and with other railways. The railways or tramroads were made under the powers of their Act, and were free to the public on payment of certain tolls. By the Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 55, the general district rates shall be made and levied upon the occupier of all such kinds of property as are assessable to the poor rate, subject to this, among other exceptions, that "the occupier of any land covered with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance," is to be assessed at one fourth only of the net annual value. Held,

1. That the dock was "land covered with water," within the exception and therefore rateable at one fourth only of the net annual value.
2. That the warehouses and other adjuncts to the dock were rateable at the net annual value.
3. That the railways or tramroads were constructed "for public conveyance" within the exception, and therefore rateable at one fourth only of the net annual value.

CASE stated, under stat. 12 & 13 Vict. c. 45, s. 11.

The appellants were The Newport Dock Company, who are incorporated under stat. 5 & 6 W. 4, c. lxxv., and are the owners and occupiers of docks with railways round the same.

The respondents were the Local Board of Health for the district of the borough of Newport, in the county of Monmouth, to which borough the provisions of The Public Health Act, 1848, and The Local Government Act, 1858, have been duly applied.

The Newport Dock Company's docks, railways and works are situate and being within the district of that Local Board of Health, and the Dock Company are the owners and occupiers thereof.

On the 7th day of May, 1861, the respondents made a general district rate upon all the rateable property in their district. This rate was duly published; and in it the Company were assessed as follows:

No. 2524	Name of Occupier.	Name of Owner.	Description of Property rated.	Full net annual value stated in Poor rate.	Assessable value.	Rate at 1s. 4d. in the pound on houses.
	Newport Dock Company.		Docks.	12,800L	5000L	333 <i>l. 6s. 8d.</i>

*The next preceding poor-rate for the parish of St. Woollos, [*710] in which parish the property of the appellants is situate, and upon which rate the above-mentioned general district rate was founded, was made and duly published on the 29th September, 1860; and in it the Company were assessed in respect of the same property as follows:

Description of Property rated.	Gross Estimated Rental.	Rateable value.	Rated at 1s. 8d. in the pound.
Dock and Feeder.	12,800L	5000L	41 <i>l. 13s. 4d.</i>

Notice of appeal to the next general Quarter Sessions for the county of Monmouth, against the above general district rate, was duly given and served by the appellants on the respondents, the grounds of the appeal being as follows:—First. That the rate was not assessed upon the full net annual value of the several properties, hereditaments and premises comprised in the rate, as ascertained by the rate for the relief of the poor made next before the making of such general district rate.

Second. That The Newport Dock Company was not in such rate assessed in respect of their docks and railways in the proportion of one-fourth only of the net annual value thereof, as provided by the exceptions, regulations and conditions contained in sect. 55 of The Local Government Act, 1858.

Third. That The Newport Dock Company was in such rate assessed unequally and unfairly as compared with other owners and occupiers of property, hereditaments and premises in and by such rate [*711] rated, and especially as compared with The Monmouthshire Railway and Canal Company and The South Wales Railway Company.

By The Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 55, it is enacted as follows:

"The general district rates shall be made and levied upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor, and shall be assessed upon the full net annual value of such property, ascertained by the rate (if any) for the relief of the poor made next before the making of the assessments under this Act, subject, however, to the following exceptions, regulations, and conditions;" and amongst these exceptions is as follows:—"The owner of any tithes, or of any tithe commutation rent charge, or the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

In the poor rate there are two columns, the one headed "Gross estimated rental," and the other headed "Rateable value," and the general district rate is to be assessed upon the full net annual value of such property ascertained by the poor rate. This "full net annual value," it was submitted by the appellants, must, for the purposes of a general district rate by the Local Board of Health, be in each instance the amount carried out, and appearing in the columns of the poor rate headed "Rateable value."

*712] In the poor rate, the area of the docks covered with water, and the landing places and wharfs and quays and railways along the property of the Dock Company, for transporting traffic to and from the docks, and communicating with the warehouses and with other railways, and the coal hoists, and machinery for opening and shutting the dock gates, &c., are included in the description of "dock and feeder," the rateable value of which is assessed at 5000*l.*

In the general district rate appealed against, the same property of the Dock Company is described as "docks," and incorrectly, as the appellants contended. The column in that rate headed "Full net annual value stated in Poor rate," is filled up with the sum of 12,800*l.*, which is stated in the poor rate to be the gross estimated rental of the "dock and feeder;" but in the column headed "Assessable value" the sum carried out is the sum of 5000*l.*, which is stated in the poor rate to be the rateable value, and the appellants are in the general district rate in fact assessed on the full amount of the last mentioned sum and that only.

The respondents contended that, whether or not the word "net" were correct as used, the rate was good, and the rate upon the parties was not in any way affected by the column in question.

The Newport Docks and the railways and works were made and maintained under the provisions of the Local Act of Parliament 5 & 6 W. 4, c. lxxv., and The Newport (Monmouthshire) Docks Act, 1854; and by sect. 188 of the first mentioned Act the docks, roads and works are made free to the public on payment of the stipulated rates, tolls and duties.

The appellants contended that the area of their docks, as being

"land covered with water," and also that their *railways on and over the quays and other portions of their property, and the dock appliances on and along the quays, such as cranes, weighing machines, staiths, &c., came within the exception above set out and contained in the 55th section of The Local Government Act, 1858; and that they ought to be assessed in the proportion of one-fourth part only of the net annual value thereof, ascertained by the poor rate aforesaid, and at the rate of 4d. in the pound as on land, and not at the rate of 1s. 4d. in the pound as on houses, &c.,—being after the same rate as The Monmouthshire Railway and Canal Company and The South Wales Railway Company were respectively in the same rate assessed in respect of their railways and canal. [*713]

If the Court should be of opinion that the appellants' contention was correct in whole or in part, then the assessment of The Newport Dock Company to the general district rate appealed against was to be amended, and the appellants were to stand rated as upon the sum of 1250*l.*, being one-fourth part of the sum of 5000*l.* ascertained by the poor rate to be the net annual value of the Company's docks and railways, and at the rate of 4d. in the pound as on land, or otherwise as the Court might direct.

Lush (Milward with him), for the respondents.—First. By The Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 55, the general district rates shall be made and levied upon the occupier of all such kinds of property as are assessable to the poor rate, subject to this, among other exceptions, that "the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water, or used only as a canal or *towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof." These docks are not within the exception. In *Reg. v. The Birmingham Waterworks Company*, 1 B. & S. 84 (E. C. L. R. vol. 101), a reservoir was held to be within the words "land covered with water" in the Birmingham Improvement Act, 14 & 15 Vict. c. exiii. But in *Reg. v. Peto*, 2 E. & E. 144 (E. C. L. R. vol. 102), decided upon The Watching and Lighting Act, 3 & 4 W. 4, c. 90, s. 33, by which the owners and occupiers of houses, buildings and property (other than land) were to be rated three times higher than the owners and occupiers of land, the majority of the Court held that the basin of the Victoria London Docks was not within the words "other than land," and therefore was rateable at the higher rate. The dock Company is interested in the lighting and cleansing of the streets as much as householders are. The basin in the docks for the reception of ships would be of no value without the adjuncts of wharfs, quays, warehouses, &c., and therefore cannot be separated from them in rating. [*714]

Secondly, if the docks are treated as "land covered with water," the buildings and other adjuncts could not be intended to be within the exception; and therefore should be rated at the higher rate: The South Wales Railway Company, appts., The Swansea Local Board of

Health, respts., 4 E. & B. 189, 195, 196 (E. C. L. R. vol. 82), per Lord Campbell.

Thirdly. These railways or tramways were constructed as accessory to the docks, and not for the conveyance of passengers, as the railway in The South Wales Railway *Company, appts., The *715] Swansea Local Board of Health, respts., which, by the special Act of that Company, was to be rated at one-fourth of its net annual value only. Also the use of them by the public is permissive only.

Bovill (*H. S. Giffard* with him), for the appellants.—First. As to the docks, the present case is not distinguishable from Reg. *v.* The Birmingham Waterworks Company, 1 B. & S. 84 (E. C. L. R. vol. 101); various works contemplated by The Local Government Act, 1858, 21 & 22 Vict. c. 98, *e. g.*, scavenging, are not required for the basin in the docks, which is "land covered with water;" and therefore the Legislature intended it to be rated at the lower rate. In Reg. *v.* Peto, 2 E. & E. 144 (E. C. L. R. vol. 102), it was difficult to say that because land was covered with water it was "other than land" within the meaning of stat. 3 & 4 W. 4, c. 90, s. 33.

Secondly. The buildings, cranes, weighing machines, &c., are adjuncts to the docks, and should be rated with them. [BLACKBURN, J.—In the South Wales Railway Company, appts., The Swansea Local Board of Health, respts., 4 E. & B. 189 (E. C. L. R. vol. 82), they were severed.] If they are severable it must be conceded that they are not within the exception in sect. 55 of stat. 21 & 22 Vict. c. 98.

Thirdly. These railways or tramroads were constructed under stat. 5 & 6 W. 4, c. lxxv. s. 2, by which the Company were empowered, not only to make a dock for the reception of ships in the port of Newport, with locks, piers and other works and conveniences for the entrance and egress of ships into and from the dock, and with wharfs, quays, warehouses, landing places, cranes, weighing machines, reservoirs and other works and conveniences, *but also "to make *716] and maintain a railway or tramroad, with necessary turn-outs and conveniences, for the passage of carriages properly constructed, along or near to the western bank of the Monmouthshire Canal, from a certain place in the town of Newport, called 'The Newport Tunnel,' to the western margin of the said canal," and another railway or tramroad from the termination of the first-mentioned railway or tramroad, passing over the canal, and thence along and round the sides of the dock. By sects. 9 and 11 the Company were required to complete the first-mentioned railway or tramroad, and also the continuation of that railway or trainroad by means of the railway or tramroad around the dock, so that it might be fit for the use of the public, within two years from the passing of the Act. By sect. 138, "the said dock, roads, and works shall be free, and all the King's subjects may have and enjoy the free use thereof, at all proper and reasonable times of the day and night, without interruption, hindrance, or obstruction from any person whomsoever," subject to the payment of certain rates, tolls, and duties "and subject to the rules, orders, and regulations which shall from time to time be made by the said dock Company by virtue of the powers by this Act granted." By sect. 146 it

shall be lawful for the owners and occupiers of lands adjoining the first-mentioned railway or tramroad to construct collateral branches from their lands to communicate with the said railway or tramroad for the passage of horses and carriages upon or into and along the same. These railways or tramroads therefore come directly within the description of "land used as a railway constructed under the powers of any Act of Parliament for public conveyance" in stat. 21 & 22 Vict. c. 98. s. 55. [CROMPTON, J.—If the Legislature had intended to *except only a railway for the public conveyance of passengers, they would have said so, instead of using the general term "for public conveyance."]

Lush, in reply.—Looking at the other words with which the term "land covered with water" is associated in stat. 21 & 22 Vict. c. 98, s. 55, it was intended to apply to ponds, lakes and other reservoirs for holding water, which would receive no benefit from the works contemplated by that Act; and not to basins in docks, which are capable of receiving the same benefit from such works as the other parts of the docks.

The railways or tramroads are an adjunct to the docks: they were made by the Company for their own purposes, and are to be used only by that portion of the public who use the docks. The whole of the premises of the Company are to be taken together as one great commercial establishment: *Reg. v. Peto*, 2 E. & E. 144 (E. C. L. R. vol. 102).

COCKBURN, C. J.—On the main question,—whether the dock is to be rated on the higher or on the lower scale, I am of opinion that the case falls within the principle of the decision in *Reg. v. The Birmingham Waterworks Company*, 1 B. & S. 84 (E. C. L. R. vol. 101). If the dock, with the surrounding buildings, were taken as a whole, it would become something more than "land covered with water;" but that part which is the basin or reservoir is within that description; and there seems to be good reason why the Legislature used so wide and comprehensive a term, because the rate levied under The Local Government Act, 1858, being for particular sanitary purposes, when land is used for agriculture or gardens, or for purposes in which it is *necessary that it should be covered with water, the owner or occupier has not the same benefit from the objects carried out by the rate as the owner of houses and other buildings, and therefore it is reasonable that he should be assessed at the lower rate. It is not, however, necessary to speculate, when the language used by the Legislature, according to its ordinary meaning, comprehends the subject-matter in question. If it was not intended to include this dock within the exception in sect. 55, the generality of the term must be restricted by further legislation.

Mr. Bovill was obliged to give up the second point, and to admit that the warehouses and other adjuncts must be treated as severable from the dock, and therefore not within the exception in sect. 55.

On the other hand, the railway or tramroad is not merely a road of a private character; it connects the docks with the Monmouthshire Canal, and with other railways; and it is open to the public upon payment of tolls: it is, within the language of sect. 55, "a railway constructed for public conveyance," and therefore is to be rated on the lower scale. What is to be considered as part of a railway for this purpose was decided in *The South Wales Railway Company*, appts.,

The Swansea Local Board of Health, respts., 4 E. & B. 189 (E. C. L. R. vol. 82).

CROMPTON and BLACKBURN, JJ., concurred.

MELLOR, J., came into Court during the argument, and took no part in the judgment.

Rate to be amended, without costs.

*719] *The QUEEN v. ROBERT WARTON the younger. June 4.
Commissioners of sewers.—Presentment.—Order for repairs.—3 & 4 W. 4, c. 22, s. 13.

Stat. 3 & 4 W. 4, c. 22, s. 13, reciting that doubts had arisen whether a presentment of a jury was not necessary on each and every occasion to repair works within the jurisdiction of Commissioners of Sewers, enacts that whenever under any commission a jury shall have presented that any person is liable to repair any defence, wall, &c., in respect of any lands, &c., it shall not afterwards, during the continuance of such commission, be necessary to inquire by jury and obtain a presentment upon any subsequent wants of reparation of the same defences, walls, &c., but such person so presented, and the owners and occupiers for the time being of such lands, &c., shall be liable from time to time to repair such defences, walls, &c., according to such presentment; and it shall be lawful for the Commissioners to order the same to be repaired by such person from time to time during the continuance of such commission accordingly. Under a commission issued in 1860, a jury in 1861 presented that S. A., being owner of lands in C. Marshes, was liable to repair a certain sea wall. By an order made in 1860 under the same Commission, upon the evidence of the marsh bailiff, that the defendant was owner of the C. Marshes, and upon the depositions of the marsh bailiff, and the expeditor and an indifferent person, it was ordered that the defendant do repair the sea wall on C. Marshes. Upon certiorari, held that the order was bad, on the ground that the above enactment did not authorize the Commissioners to make the order without a presentment of ownership by a jury; and *semble*, per Cockburn, C. J., and Crompton, J., also on the ground that the fact of want of repair of the sea wall had not been ascertained according to law.

In Michaelmas Term, 1861, Stammers obtained a rule calling upon the Commissioners of Sewers for the levels within the limits of the several parishes of Fobbing, Corringham, Stanford-le-Hope, Mucking, Laindon Dunton, Little Warley, and Vange, in the county of Essex, to show cause why certain presentments and orders (which had been brought up by certiorari), made at Courts of Sewers held respectively on the 26th July, 1860, and the 80th May, 1861, before, &c., touching the ownership by the defendant, Robert Warton the younger, of certain marshes, called Currey Marshes, in Stanford-le-Hope, *and

*720] his liability to repair the sea wall on the said marshes, should not be quashed.

The first order or presentment purported to have been made at a Session and general Court of Sewers held for the levels within the limits of the said parishes or in the borders or confines of the same, and within the limits and jurisdiction of the Commission of Sewers issued under the Great Seal, on the 8th November, in the 14th year of the present reign, at, &c. (being a place within the distance of ten miles from the limits of the said commission), on Thursday, the 26th July, 1860, before, &c., and was as follows:

"At this Court it appears upon the evidence of Henry Sackett, the marsh bailiff, that Robert Warton, Esq., is now the owner of certain marshes called Currey Marshes, in the parish of Stanford-le-Hope, late belonging to Stephen Allen.

"Also at this Court, upon taking the depositions on oath of Henry Sackett the marsh bailiff, John Blyth, the expeditor, and William

Eastwood, an indifferent person, It is ordered that Robert Warton, Esq., do repair the sea wall on the Currey Marshes, in the parish of Stanford-le-Hope, in manner following, that is to say, &c., and that he do complete all the said several repairs on or before the first day of November next, under the several penalties following (that is to say); as to the repairs firstly hereinbefore mentioned, of 20*l.*; as to the repairs secondly hereinbefore mentioned, of 40*l.*; as to the repairs thirdly hereinbefore mentioned, of 30*l.*; and as to the repairs fourthly hereinbefore mentioned, of 20*l.*"

The second order or presentment purported to have been made at the first general Session and Court of Sewers for the levels within the limits of the same *parishes, with all other marshes, meadows, [#721 and oozy grounds within the limits aforesaid in the said county, or in the borders or confines of the same, and within the limits and jurisdiction of the Commission of Sewers issued under the Great Seal on the 19th November, in the 24th year of the present reign, holden at the same place, on Wednesday, the 30th May, 1861, before, &c.; and was as follows:

"At this Court it appearing upon the evidence of the said John Blyth that Robert Warton, Esq., had not complied with the order made upon him at the last Court, to repair and make good the sea wall on Currey Marsh Farm; It was resolved and ordered that the Clerk do forthwith give notice to the said Robert Warton that he immediately continue to make good and complete the said repairs in obedience to and in accordance with the order made at the last Court, and that if the same be not completed on or before the 30th day of July next, the penalties referred to in the said order be enforced under the same order."

A notice served on the defendant in accordance with the foregoing order recited, that at a meeting of the Commissioners of Sewers for the levels within the limits of the same parishes, holden on the 18th September, A. D. 1851, "it was duly presented by a jury then lawfully impanelled and sworn in that behalf, amongst other things, that the several persons mentioned and described in the second part of the schedules thereunder written or thereunto annexed, being owners of the several lands and hereditaments set out opposite to their respective names and descriptions in the said second part of each such schedules, and their ancestors and predecessors, owners of the same lands and hereditaments, had from time immemorial been used and *ac- [#722 customed to support and repair, and of right ought to have supported, maintained, and repaired, at their own respective costs and charges, the several and respective quantities of walling within the limits and jurisdiction aforesaid mentioned and set forth in the second part of the same several schedules respectively opposite the respective names and descriptions of the said several persons, by the reason of the tenure of their said respective lands and hereditaments; and that the said several persons named and mentioned in the said several schedules were then the owners of the lands and hereditaments therein set opposite to such their respective names and descriptions, and by reason of the tenure of the lands and hereditaments respectively were then liable and ought of right to support, maintain, and repair; and keep in good and sufficient repair, at their own respective costs and

charges, the several and respective quantities of walling within the limits and jurisdiction aforesaid mentioned and set forth in the said second part of the same several schedules respectively opposite to their respective names and descriptions and at the respective parts and places thereiu also mentioned and described, so as to prevent the influx of the waters from the rivers and creeks surrounding and near the levels aforesaid (in all of which said rivers and creeks the tides and waters of the sea did then and still do flow and reflow). And whereas, by the second part of one of the schedules in the said presentment contained, it was stated and alleged that one Stephen Allen was then the owner and occupier of part of certain marshes called Currey Marshes, in the parish of Stanford-le-Hope, containing 107 acres and 8 perches, of which said presentment notice was duly served upon the said Stephen Allen, but he did not traverse the same, and [728] the said *presentment was thereupon duly confirmed, but the said Stephen Allen nevertheless afterwards duly paid the marsh lots assessed in respect of his said portion of the Currey Marshes down to the time of the finding of yourself as owner thereof as next herein-after mentioned."

The notice then recited the decree and order made at the Court of Sewers on the 26th July, 1860, and that the defendant had then due notice thereof; and that it was proved unto the said Commissioners, under a new commission for the said levels, at the Court held on the 30th May, 1861, that the defendant had not repaired the sea wall as by the decree and order he was directed; and concluded thus:

"Now I, the undersigned Thomas Morgan Gepp, clerk to the said Commissioners, therefore hereby give you notice to appear before the said last-mentioned Commissioners on Thursday, the 1st day of August next, at ten o'clock in the forenoon, at The George Inn, in Orsett, in the county of Essex, to show cause why you have not repaired the same, and why you should not, for such your default, be fined by us in the several different sums aforesaid.

T. M. GEPP,

"Chelmsford, Essex."

The affidavit of Henry Sackett, in opposition to the rule, stated that he was appointed as the collector and expenditor of the marsh lots or marsh rates for the levels within the limits of the said parishes in February, 1857; and continued to act as such down to the month of July, 1857, when he resigned the said offices, on being appointed marsh bailiff for the said levels; that, during the whole of his term of office [724] as such collector and expenditor, he regularly received from Stephen Allen the *annual marsh lots assessed in respect of the Currey Marshes, of which he had been presented as the owner by a jury at a Court held for the said levels on the 18th September, 1851, and at a previous Court under a former commission, and Stephen Allen never disputed or denied his liability to pay the said marsh lots; that his report as marsh bailiff to the Court of Sewers, held on the 26th July, 1860, that the defendant had become the owner of the said marshes lately belonging to Stephen Allen was founded upon inquiries made by him from Mr. Morley, the then tenant of the said marshes, who informed him that the defendant had become the landlord thereof; and upon the fact that he had, previous to July, 1860, corresponded with the defendant in reference to the repairs of the sea

wall on the said marshes, and in such correspondence he had treated the defendant as the owner thereof, and the defendant had not, in such correspondence, denied that he was such owner; and upon general local reputation that Stephen Allen had given up the said marshes to his son in law the defendant.

The affidavit of Thomas Morgan Gepp, the clerk to the Commissioners, stated that, on the 8th November, 1850, a new Commission of Sewers for the said levels was duly issued, as is usual in every tenth year; and at a Court held on the 18th September, 1851, a jury, summoned in accordance with the Act of Parliament (3 & 4 W. 4, c. 22) for the purpose of finding the ownership and liabilities under such new Commission, presented as follows: [The presentment was as recited in the notice served on the defendant by the marsh bailiff.] The affidavit also set out an extract from the second part of the first schedule to the said presentments, showing that *Stephen Allen was owner and occupier of part of Currey Marshes, and specifying the quantity of land held by him, and the description of walling which he was liable to repair. The affidavit then stated that, in pursuance of an order of the Court, the deponent served on Stephen Allen a copy of the presentment and of the schedule thereto, so far as it affected him, and a notice of the day and hour of holding an adjourned Court, at which he might traverse the presentment if he thought himself aggrieved by it; and that Stephen Allen did not traverse the presentment, and the same, and the schedule, were therefore, by an order of the said Court, confirmed.

Lush (Tindal Atkinson with him), for the prosecutors.—The first objection is that the presentment made by the marsh bailiff, at the Court holden on the 26th July, 1860, that the defendant was then owner of the Currey Marshes, was insufficient to found the order upon him to repair the sea wall in question; and that such an order can only legally be made upon a presentment by a jury. But it appears from the affidavit of the clerk to the Commissioners that a jury had presented the persons liable to repair the sea wall ratione tenuræ, and the extent of their liability. [Bovill objected that the affidavits filed on showing cause could not be looked at. BLACKBURN, J.—One of the questions is, whether the facts stated in the affidavits make the order good: we must look at them in order to determine that.] After a presentment of the liability of the land, a change of ownership during the continuance of the same Commission need not be presented; but the Commissioners may act on their own knowledge, or on information given *by their officers. At common law there was a doubt whether every order for repair must not have been founded on the fact of want of repair found by a jury. [BLACKBURN, J.—In the form of commission given in stat. 23 H. 8, c. 5, s. 3, the Commissioners were among other things to inquire by a jury of the shire or place where any defaults or annoyances be, "through whose default the said hurts and damages have happened, and who hath or holdeth any lands or tenements, or common of pasture, or profit of fishing;" and that inquiry involved two questions—was the wall out of repair, and if it were, who ought to repair, i. e. who holds the lands liable to repair?] That inquiry took place on the first presentment. The practice under that statute was to notify a change

of ownership, not to present it. Stat. 3 & 4 W. 4, c. 22, s. 13, was intended to prevent the necessity of summoning a jury on every occasion either of repair becoming necessary or of change of ownership; after reciting "whereas doubts have arisen whether a presentment of a jury is not necessary on each and every occasion to repair defences and works within the jurisdiction of Commissioners of Sewers," it enacts, "That whenever, under any commission now in force or which shall hereafter issue, a jury shall have found and presented that any person, body politic or corporate, is or are liable to and ought to maintain and repair or contribute to the maintenance and repair of any defence, wall, bank, sewer, or other work within the jurisdiction of the Commission of Sewers acting under or by virtue of such Commission, in respect of any lands, tenements, or hereditaments, or common of pasture, or profit of fishing, it shall not afterwards, during the continuance of such commission, be necessary to inquire by jury and *obtain a presentment upon any subsequent wants of amendment and reparation of the same defences, walls, banks, sewers, or works, or any of them, but such person, body politic or corporate, so presented as aforesaid, and the owners and occupiers for the time being of such lands, tenements, or hereditaments, or common of pasture, or profit of fishing, shall be liable from time to time to maintain and repair or contribute to the maintenance and repair of such defences, walls, banks, sewers, and other works, according to such presentment; and it shall and may be lawful for the Commissioners of Sewers to decree, order, and direct the same to be maintained and repaired by such person, body politic or corporate, from time to time during the continuance of such commission accordingly." This section enables the Commissioners to make an order without a fresh presentment upon the person or body found liable by the original presentment, or upon the present owners or occupiers; "such person, body politic or corporate" must be read as including "the owners and occupiers for the time being."

The second objection is, that the defendant had no notice of the presentment. But with respect to a wall being out of repair, notice is not necessary before repairs are ordered to be done. (He cited Callis on Sewers 127). [CROMPTON, J.—In analogy to every process of law there should be a notice to the party, that he may have an opportunity of showing that he is not owner, or that no repairs are necessary, as the case may be.] Promptitude is necessary, because the danger may be imminent; and for that reason if a person were found liable to repair a bank, and he removed the inquisition into this Court, the Court would not quash it unless he first repaired the bank, the cost *of which he would be reimbursed if ultimately he was not liable: Dunbarr's Case, 1 Sid. 78. It appears from the affidavit of the clerk to the Commissioners that the invariable course of practice has been followed in this instance. [COCKBURN, C. J.—Suppose the owner disputes the wall being out of repair.] The law intrusts the Commissioners to act on their own view, or upon the report of competent persons: Callis on Sewers 105, 106, 107, where the office of surveyor to the Commissioners is described. [CROMPTON, J.—Here the Commissioners have not acted on the report of their surveyor, whose duty it is to superintend the works, but upon the

information of the marsh bailiff, and the expenditor, whose duties are defined in the form of appointment given in Callis on Sewers, App., Nos. 13 & 15, 4th ed., by Broderip;—the duties of the former officer being to serve orders and execute warrants of the Commissioners, and of the latter to disburse the moneys raised for maintaining the sea walls.] It is not said that the Commissioners are bound to appoint a surveyor; and the Court will give the Commissioners credit for appointing competent persons to be their officers. [BLACKBURN, J.—The argument for the Commissioners must go the extent of saying that the information of any three indifferent persons would be sufficient.] The discretion of the Commissioners is very extensive: Callis 112. If a jury had been summoned under stat. 3 & 4 W. 4, c. 22, s. 11, they might have acted on the evidence upon which the Commissioners acted in this instance. [CROMPTON, J.—I think the ownership was always intended to be traversable, and the defendant has not had an opportunity of traversing it. BLACKBURN, J.—What is the remedy if the fines imposed *in the event of non-repair are not paid? [#729] If the liability of the new owner is a personal liability, there would be great injustice in making an order upon him without giving him an opportunity of being heard; though not, if the fines can only be levied by distress upon his goods on the land in respect of which the liability to repair is incurred. *Bovill*, contra.—The fines used to be estreated into the Court of Exchequer: Callis 176.] That is abolished by stat. 3 & 4 W. 4, c. 22, s. 53, and the fines, &c., are to be “levied by distress and sale of the goods and chattels of the person, body politic or corporate, upon whom such fines, &c., shall or may be so set or imposed by warrant under the hands and seals of the said Commissioners.” [BLACKBURN, J.—Then the goods of the defendant may be taken anywhere.] If he is not the owner he might, when distrained upon, bring an action against the Commissioners, on the ground that the order was made without jurisdiction. [BLACKBURN, J.—Even where there is a notorious change of ownership, it would be convenient to have a fresh presentment by a jury.] If stat. 3 & 4 W. 4, c. 22, s. 18, dispenses with a presentment by a jury only where the ownership remains the same, what effect is to be given to the words “and the owners and occupiers for the time being of such lands shall be liable?”

Bovill (*Stammers with him*), contra, was not called upon.

COCKBURN, C. J.—I am of opinion that these orders cannot be supported; and that they are bad on several grounds.

First, the Commissioners had not before them the *proper information as to the sea wall being out of repair, even assuming that the defendant was the person liable to repair it. According to Callis, p. 107, an authority of considerable weight, the Commissioners may proceed upon their own view, or by survey; that is, upon their own view, or assisted by measurement and by conference with competent persons whom they may call in, or by view and survey combined, or possibly upon the report of a surveyor appointed for the purpose. In the present instance they proceeded only upon the information of the marsh bailiff, and the expenditor, and a third person not having any official authority. That does not satisfy the course of proceeding laid down by Callis; and this alone would be a

sufficient ground for holding the first order bad: the other of course falls with it.

But a more serious objection arises from the non-presentment of the defendant as the person liable to repair the sea wall by reason of his ownership of the land. According to the terms of the commission set out in the Statute of Sewers, 28 H. 8, c. 5, s. 3, before an order is made upon a person to repair a sea wall, there must be a presentment by a jury that he is the person by whose default the sea wall is out of repair. Stat. 3 & 4 W. 4, c. 22, to a certain extent modifies that enactment; because whereas, under the old statute, it was necessary that the jury should find on each occasion who was liable to do the repairs, and that was inconvenient, the legislature passed section 13 of the later statute. That section, reciting that doubts had arisen whether a presentment of a jury was not necessary on each and every occasion to repair defences and works, enacts that it should no longer [731] be necessary during the continuance of the same commission to have the presentment of a "jury upon subsequent wants of repair, and that the first presentment of any given individual or body politic should be sufficient. It says that not only an individual once presented, but "the owners and occupiers for the time being of such lands," shall continue liable from time to time to repair the defences according to the presentment. But when it empowers the Commissioners to make their order, it only mentions "such person, body politic or corporate," that is, the person or body politic originally presented. Mr. Lush invites us to add in this clause the words "the owners and occupiers for the time being;" but it would be a great stretch of judicial authority to add those words; though, if it were impossible to give effect to this part of the enactment without them, we should feel much pressed by his argument. But when we look to the provisions which direct how the order is to be enforced, I think that we may give effect to it and reconcile the insertion of the words "owners and occupiers for the time being of such lands" in the former part of the enactment with the omission of the same words in the latter part. The order is to be made on the person originally presented, sect. 13; and by sect. 53, in default of compliance with it, a fine or penalty is to be paid or levied on his goods and chattels; and, by sect. 55, in default of its being paid by him or in default of sufficient distress being found, the land itself is to be liable; and so, though not primarily, the owners or occupiers for the time being may be liable. It is better to construe the former part of the 13th section as referring to the eventual liability of the owners and occupiers through the land, than to suppose that in the latter part the legislature intended us to read words which are not there.

*Upon the whole I am of opinion that the order can only be [732] made upon the person originally presented, so long as that presentment remains in force. When there has been a change of ownership since the presentment, one of two courses is open to the Commissioners, either to make an order under sect. 13 upon the person already presented, or to summon a fresh jury and have a fresh presentment of the person who has become owner instead of the person before presented. Which of these may be the more convenient course I do not know. Perhaps the best course would be to ask the

Legislature to complete the work of legislation, which seems to have been left unfinished.

CROMPTON, J.—It is not necessary to express an opinion on one point which has been fully discussed ; though I doubt whether the fact of want of repair was satisfactorily ascertained according to law. Mr. Lush has pointed out that the orders in Callis do not recite how the Commissioners have come to their conclusion ; but if they are acting with reference to a sea wall being out of repair, that should be done upon view or survey ; and I doubt whether they can act on evidence only without the presentment of a jury, which might be traversed. Here the Commissioners proceeded only on the evidence of two officers, the marsh bailiff and the expeditor, and one independent witness. I doubt whether, though the order may be good on the face of it, it may not be shown that they exceeded their jurisdiction in making their order on that evidence.

But on the other point I have a clear opinion. Before stat. 3 & 4 W. 4, c. 22, it was necessary to ascertain, by the presentment of a jury, the ownership of the person *to be charged with the repairs, and that person had a right to traverse the finding of the jury, though he had not a right to traverse the directions of the Commissioners founded on that presentment: *Wingate v. Waite*, 6 M. & W. 739. We find that from the earliest times that course has been adopted. In the charge given in Callis on Sewers, Appendix, p. 365, ed. by Broderip, the jury are to inquire "of what lands and grounds are lying and being within the reach of injury or danger by any defects or defaults, and to whom they are belonging ; and of the persons fit and proper to be charged to the repairs, with the quantity and quality of their estates ; so that all such persons may be charged and taxed in proportion to their rights and interests." This is not merely incidental to mentioning the lands, but it is an essential part of the inquiry. For it would be monstrous if an order may be made upon a person and carried out by the imposition of a fine and by distress, without any means afforded to him of disputing his liability, or any opportunity given to him of being heard, or of traversing the finding of a jury made behind his back ; and he is to be told that if the Commissioners have done wrong, and exceeded their jurisdiction, he may bring an action against them. That is not the course of our law ; though there are one or two singular exceptions which have been reprobated, viz., the finding of a fugam fecit by a coroner's jury, which occasioned a forfeiture of lands and goods. We are asked to put the defendant in the position of a person who has no opportunity of answering the charge. That could not have been done before stat. 3 & 4 W. 4, c. 22. The case of a person coming into the ownership of property after a presentment is just the same as regards *his liability, as if there had been no presentment ; and I cannot see what protection it is to say to a person who denies his liability :— "A. B. had the opportunity of contesting his liability six or seven years ago, and did not do so." As a general rule a person must have an opportunity of answering, unless the Legislature has interfered with that right.

That brings me to sect. 13 of stat. 3 & 4 W. 4, c. 22, which recites that doubts had arisen whether a presentment of a jury was not

necessary on every occasion; and I apprehend the doubts were whether, when fresh repairs were to be done, it was necessary to inquire by a jury as to the continuance of the liability of a person who had been found liable. Then the Legislature thought that they might go to this extent,—that where a person has had an opportunity of traversing the presentment, and has not done so, he may by reason of his acquiescence be considered liable so long as the same commission lasts. From the change in the phraseology of the section, which has been adverted to, and the use of the word "such" in the clause which empowers the Commissioners to make the order, it seems to me that the order is to be made only on the person or body presented. By introducing the words "the owners and occupiers for the time being," the Legislature may have merely meant to say, "We do not take away from the lands which persons own or occupy any liability thrown upon them;" because by the old law the fine or penalty is leviable upon the lands either by taking the rents and profits or by distress. Whether that be so or not, the order is distinctly to be made on "such person, body politic or corporate," that is, "the person, or body politic or corporate, so presented as afore-said." *Therefore, whatever meaning is to be given to the words "the owners and occupiers for the time being," Mr. Lush does not bring the case within this section: and, if not, there is no foundation for these orders, because there has been no presentment of the liability of the person charged by them.

BLACKBURN, J.—I do not express any opinion on the points not necessary to be decided, viz., as to the extent of the power of the Commissioners to survey, to take evidence, and to act upon evidence on the question of fact whether the sea wall or other defence is out of repair.

But I think that the first order is not good on the ground that it was made on the defendant without the presentment of a jury that he is a person upon whom it should have been made. It was laid down, in *Wingate v. Waite*, 6 M. & W. 739, that the presentment of a jury is the foundation of the jurisdiction of the Commissioners. However that may be, it is clear that the presentment of a jury that a particular person is liable is a necessarily preliminary step to an order on him to repair; because it is unjust and contrary to the general course of law to make such an order on a person *ex parte*, without giving him an opportunity of being heard.

Then the question is, whether sect. 18 of stat. 3 & 4 W. 4, s. 22, has altered that. [His Lordship read the section.] That dispenses with a fresh presentment where a particular person has been presented as liable to repair in respect of any lands. Whether an order can be made on the person named in the presentment after he has in fact ceased to own or occupy the lands in respect of which the presentment proceeded, is a question of *difficulty which it is not necessary to decide; indeed it is not competent for us now to decide what would be the proper course in such a case. The Commissioners certainly may summon another jury, and have a fresh presentment on the new owner. That course would I think be safe, though, as Mr. Lush says, it is inconvenient; or they may in this case make the order on Stephen Allen, and, if so made, it must be competent for

him to say that it was void because he had ceased to be owner of the land. But when an order, as in the present case, is made without a presentment which the person upon whom the order is made could traverse, and is made merely upon declarations that he was owner or occupier, which he had no opportunity of denying, it would be contrary to the general course of law to hold him liable upon it; and if the Legislature intended to enact such an anomaly they should have expressed it in clearer language.

Rule absolute.

HALL v. The CITY OF LONDON BREWERY Company, [737
Limited. June 6.

Lease.—Quiet enjoyment.—Declaration.—Breach.

1. In a contract for the demise of land, a promise of quiet enjoyment during the term is implied by law.
2. A declaration for breach of a covenant or contract for quiet enjoyment must allege an eviction by a person claiming title paramount.

THE declaration stated that heretofore, to wit, on the 29th October, 1860, an agreement of demise was made by and between the defendants and the plaintiff, whereby they agreed in the words and figures following (that is to say): "Memorandum of an agreement entered into the 29th October, 1860, between The City of London Brewery Company, Limited, by N. C., secretary, of the one part, and Edward Hall of the other part, as follows; viz. the said Company do hereby agree to let from this day unto the said Edward Hall, All that messuage or tenement, with the appurtenances, known by the sign of The White Hart, situate in the Borough Market, in the parish of St. Saviour, Southwark, at a clear yearly rent of 50*l.* of lawful British money, to be paid quarterly without deduction of any kind except in respect of income tax, and at the same rate for any period less than for a quarter of a year, the first quarterly payment to be made on the 29th January now next. And the said Edward Hall doth hereby agree to take the said house and premises upon the terms above mentioned, and to pay the said rent in manner aforesaid, and the land tax, metropolitan drainage rate and sewers rate, and all parliamentary and parochial taxes in respect *of the said premises, and to quit and [*738 surrender up the possession thereof unto the said Company, or their authorized agent, at any time hereafter upon the expiration of three calendar months notice requiring him so to do, whether such notice shall expire at the time of the year his tenancy commenced, or at any other period or day in the year. And the said Edward Hall doth hereby also agree that he will keep open the said house as a public-house at the usual hours of business, and not suffer any other person to occupy the same, nor ask, demand or receive from any person any consideration or gratuity, directly or indirectly, by way of premium or goodwill for the same, nor in anywise injure or lessen the trade thereof, nor do or suffer to be done anything whereby the license for selling beer shall be lost, forfeited or endangered, but will at all times use and occupy the said house properly as a licensed public-house only; and also that, on quitting the same, he will assign over

the beer and other licenses of the said house unto any person or persons whom the said Company may appoint, on being paid for the unexpired term therein; and also that he the said Edward Hall will, during all the time he shall occupy or retain possession of the said premises, purchase and keep a sufficient stock of porter, ale and beer for sale therein, of the brewing of the said Company and of none others, and also that he the said Edward Hall will not at any time alter or suffer to be altered the quality of such porter, ale or beer. And it is also agreed that no repairs or alterations of the said house and premises shall be allowed for unless made under the authority of the surveyor of the said Company. And it is mutually agreed between *739] the said parties hereto that if either of them shall break or *infringe or refuse to comply with and perform any of the articles and agreements above mentioned on their respective parts to be performed (save and except such of the said articles and agreements as this present provision cannot legally or properly be applied to), then the party so breaking or refusing shall pay to the other of them, on demand, the sum of 300*l.*, of lawful money of Great Britain, as liquidated damages hereby settled between the said parties for such breach or non-performance; and no abatement or relief shall be applied for to any Court of law or equity. And, lastly, it is agreed that the said Company, their successors and assigns, shall have power to distrain for the said rent upon any fixtures in the said house and premises, from time to time as often as the rent shall be in arrear, and to sell, dispose of and deal with such fixtures in the same manner in all respects as a landlord may sell, dispose of and deal with distrainable goods and chattels distrained and taken for rent in arrear. Witness the hands of the parties the day and year first above written." Averments. That by virtue of the said agreement of demise the plaintiff afterwards, to wit on the said 29th October, 1860, entered into and upon the said demised premises and became and was possessed thereof for the said term so to him thereof granted; and that the plaintiff had done all things necessary on his part to entitle him to have the quiet enjoyment of the demised premises for the term so to him thereof granted. The declaration then alleged that the plaintiff was, after the making the demise, and after his entry, and during the term, ejected from the demised premises by persons having title thereto, and had from thence hitherto been deprived of the possession, use, *740] occupation and *enjoyment thereof; by means and by reason of which premises he wholly lost the goodwill and trade of the business of a licensed victualler which he carried on in and upon the demised premises, and was prevented from selling the same to one James Nash, and also by reason of the premises the plaintiff lost certain fixtures which he then had in and upon the demised premises, and was put to expense in obtaining another house and in removing thereto, and was otherwise injured: and that, after he was ejected and evicted as aforesaid, and by reason thereof and of the premises, the defendants became and were liable to pay to the plaintiff the said sum of 300*l.* in the agreement mentioned as and for such liquidated damages as aforesaid when they should be thereto requested: Yet the defendants had not, although requested so to do, paid to him the said sum of 300*l.*, &c.

Demurrer, and joinder therein.

Bushby, for the defendants.—The declaration is bad on several grounds. First, it is not averred that the eviction of the plaintiff was by persons having title to the premises before or at the time of the lease to the plaintiff. [He cited *Pargeter v. Harris*, 7 Q. B. 708 (E. C. L. R. vol. 53).] [Beasley, contra, referred to the form of declaration given in *Precedents of Pleadings*, by Bullen and Leake, p. 120, and to note 10 to *Wotton v. Hele*, 2 Wms. Saund. 177, 181, 6th ed. WIGHTMAN, J.—Suppose the tenant had made a sublease; according to the allegation in this declaration the eviction may have been by the sublessee, and consequently under a title derived from the plaintiff himself. CROMPTON, J.—The person evicting must show good title by title paramount. Therefore this allegation is defective; but the Court would probably allow it to be amended.]

*Secondly. Suppose the declaration amended in that respect, [*741 it is bad for not showing a breach of agreement, inasmuch as a contract for quiet enjoyment is not necessarily implied in this demise: Note (c) to *Wotton v. Hele*, 2 Wms. Saund. 177, 178, 178 a, 6th ed. In *Bandy v. Cartwright*, 8 Exch. 913, the declaration alleged that one of the terms of the demise was that the plaintiff should, during the term, quietly enjoy the premises, and, this being traversed, the jury found for the plaintiff. [CROMPTON, J.—But the point whether a covenant for quiet enjoyment could be implied by law from a parol demise was reserved for the Court; and in the argument the following passage from *1 Shep. Touchst.*, by Preston, p. 165, 7th ed., was cited: "If one make a lease for years of land by the words 'demise or grant,' and there is not contained in the lease any express covenant for the quiet enjoying of the land; in this case the law doth supply [read, imply] a covenant for the quiet enjoying of it against the lessor, and all that come in under him by title, during the term." COCKBURN, C. J.—And a promise which the law implies need not be set out in the declaration.] The decision in *Bandy v. Cartwright* conflicts with the judgment of Cresswell, J., in *Messent v. Reynolds*, 3 C. B. 194, 203 (E. C. L. R. vol. 54). In the sale of a personal chattel there is no implied warranty of title: *Morley v. Attenborough*, 3 Exch. 500. [COCKBURN, C. J.—We cannot overrule *Bandy v. Cartwright*; and it is inconsistent with common sense that, when a man is let into possession for a year, a promise by the lessor for quiet enjoyment against himself and all that claim by title under him should not be implied.]

*Thirdly. The stipulation for 300*l.*, as liquidated damages, [*742 does not apply to the matters complained of in the declaration. [COCKBURN, C. J.—In this state of the record we cannot decide how the damages are to be assessed. CROMPTON, J.—We cannot be asked to answer a speculative question, whether the defendants should be liable for all the damages claimed in the declaration.]

Beasley, contra, was not called upon.

COCKBURN, C. J.—On the first point the plaintiff may amend his declaration without payment of costs, by adding that the person by whom he was ejected claimed by title paramount.

On the second point *Bandy v. Cartwright*, 8 Exch. 913, is a direct

authority that a contract for quiet enjoyment is implied in a contract of demise; and I think that case is good law.

WIGHTMAN, J., concurred.

CROMPTON, J.—I do not give any opinion on the point decided in *Bandy v. Cartwright*: it is, however, a judgment which binds us.

BLACKBURN, J., concurred.

Judgment for the plaintiff accordingly.

*743] *GARDINER v. HOUGHTON. June 6.

Debt.—Discharge under law of Colony.

Declaration for money received, money lent, money paid, interest, and on accounts stated. Plea, that the defendant was resident in the Colony of Victoria, and that the debts were contracted within the Colony of Victoria, and subject to the laws thereof; and that the defendant was discharged from the debts by the insolvent law of the Colony. Replication. 1. That when the debts were contracted the plaintiff was resident at L. in England, and that at the time of the commencement of the suit the defendant was resident in England. 2. That under and by virtue of the contracts by which the debts became payable, they ought to have been paid to the plaintiff in England. Held that the replications showed no answer;—because the first admitted that the debts sued on were contracted within the Colony of Victoria; and the second did not show that they were payable in England, and not elsewhere.

DECLARATION for money received, money lent, money paid, interest, and on accounts stated.

Pleas. 1. Never indebted.

2. That the defendant was resident at Melbourne, in the Colony of Victoria, and that the moneys became due and payable as in the declaration mentioned, and the debts in the declaration mentioned were contracted, within the Colony of Victoria, and subject to the laws thereof; and that, after the moneys became due and payable as in the declaration mentioned, by a certain order of a Judge of the Supreme Court of the Colony, the estate of the defendant was placed under sequestration in the hands of the Chief Commissioner for Insolvent Estates of the Colony, and for the purpose of being distributed among the plaintiff and other creditors; and that thereafter, and before the commencement of this suit, the said Chief Commissioner for Insolvency

*744] duly certified *that the defendant was discharged from his debts, and thereafter, and before the commencement of this suit, the certificate was allowed and confirmed by the Supreme Court of the Colony, and by force of the certificate, according to the laws in force in the Colony, the defendant was released and discharged from the debts in the declaration mentioned, and the moneys before the commencement of this suit ceased to be payable by the defendant to the plaintiff.

Replication. 1. To the first plea. Issue thereon.

2. To the second plea. That before and at the time when the moneys in the declaration mentioned became due and payable, and the debts in the declaration mentioned were contracted, the plaintiff was and from thence hitherto hath been and still is resident at Liverpool, in the county of Lancaster, out of the jurisdiction of the Supreme Court of the Colony of Victoria, and that, before and at the time of the commencement of this suit, the defendant was and from thence

hitherto hath been resident in England out of the jurisdiction of the Supreme Court of Victoria.

3. To the second plea. That, under and by virtue of the contracts by which the debts in the declaration mentioned became due and payable, the said debts became and were payable, and ought to have been paid to the plaintiff, in England, out of the jurisdiction of the Supreme Court of the Colony of Victoria.

Issue on replications 2 and 3.

Demurrer to the same replications. Joinder.

The case was argued (June 3d and 6th).

Broun, for the defendant.—The first replication to the second plea is bad, as it admits that the debts *were contracted within the Colony of Victoria, and subject to the laws thereof, during the residence of the defendant there; and the debts were therefore discharged, according to the rule laid down by Lord Ellenborough in *Potter v. Brown*, 5 East 124, 130, following what was said by Lord Mansfield in *Ballantine v. Golding*, Co. Bankt. Laws 347 1st ed., 487 8th ed., "what is a discharge of a debt in the country where it was contracted, is a discharge of it everywhere."

The second replication to the second plea is bad: it does not aver that the debts in the declaration mentioned were originally contracted to be paid in England. If there was such a special contract, it ought to have been declared upon, and then, if it had appeared from the manner in which the contract was to be carried into effect, that the parties intended to place themselves under the law of another country, the *lex loci contractus* would not have applied: *Robinson v. Bland*, 2 Burr. 1077, 1078, per Lord Mansfield. *Prima facie* where one party to a contract is resident and domiciled in a Colony the law of that Colony governs the contract. [BLACKBURN, J.—In Story's *Confl. Laws*, s. 280, 5th ed., it is said, "The rules already considered suppose, that the performance of the contract is to be in the place where it is made, either expressly, or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." It is not said that the contract, as to its being discharged, *is to be so governed.] "Where the contract is to be performed in any other place," must mean by both parties: it cannot mean that the contract should be governed by different laws as regards the two parties to it. [COCKBURN, C. J., referred to Scott *v. Pilkington*, ante, p. 11.]

Archibald, for the plaintiff.—The *lex loci solutionis* governs the discharge of a contract: *Bartley v. Hodges*, 1 B. & S. 875 (E. C. L. R. vol. 101). [BLACKBURN, J.—In that case the bill of exchange was drawn and accepted in England, and the other moneys claimed were payable in England, and neither the plaintiff nor the defendant was domiciled in the Colony of Victoria.] It is of no importance where the contract was made or the parties were domiciled. The only question is where the contract was to be performed; and in the present case it appears upon the whole record that it was to be performed in England.

The second plea is bad for not showing that the debts were payable in the Colony of Victoria as well as contracted there. The declaration would be supported by evidence of a contract for money lent in Victoria to be repaid in England; the second plea is consistent with that; and the matter is reduced to a certainty by the second replication to that plea. As to the averment in the plea that the debts were subject to the laws of the Colony, they may be subject in some respects, but not in respect of their discharge.

Also, the first replication to the second plea is a good answer to it. The plaintiff is not bound by the discharge, because he was never resident within the jurisdiction of the Court of Victoria, and had no notice of the proceedings by which it is alleged that his debt is barred. Victoria, though a Colony, is a foreign country for this purpose.

*747] *[WIGHTMAN, J.—Suppose the action had been brought in Victoria and the defendant had pleaded his discharge, and thereupon judgment had been given for him, and afterwards the plaintiff and the defendant came to England, could the plaintiff recover in an action here?] No; because by bringing his action in the Court of Victoria he had elected to subject himself to the law of that Colony.

If the first replication to the second plea is defective, at all events the second replication to that plea shows that the breach of contract took place out of the jurisdiction of the colonial Court. It alleges that "the debts became and were payable and ought to have been paid to the plaintiff in England." [WIGHTMAN, J.—The replication does not allege that the debts were payable in England and not elsewhere.] It does so, in effect, by the statement that they became payable in England "*under and by virtue* of the contracts in the declaration mentioned." [BLACKBURN, J.—Under this declaration the plaintiff could not give in evidence a contract to pay at a particular place, and not elsewhere.] Yes: the declaration is general, and would be supported by evidence either of a general or special contract, provided the time of payment had elapsed before action brought. [CROMPTON, J.—The point as to the *lex loci solutionis* could not be raised without an amendment of the declaration by adding a count upon a special contract. That point is not raised on the pleadings, and, if it were, there is the strong authority of Lord Ellenborough in *Potter v. Brown*, 5 East 124, 180, against the plaintiff.]

*748] COOKBURN, C. J.—On this state of the record it must be taken that the debt sued on was contracted in the Colony of Victoria, and payable there; and there is a plea of discharge under the law of that Colony. The rule adopted by Lord Ellenborough in *Potter v. Brown*, 5 East 124, 180, after the cases of *Ballantine v. Golding*, Co. Bankt. Law 347 1st ed., 487 8th ed., and *Hunter v. Potts*, 4 T. R. 182, viz., "that what is a discharge of a debt in the country where it was contracted is a discharge everywhere," applies to a discharge by a Court in a foreign country: à fortiori, it applies to a discharge by a Court in one of the British Colonies.

WIGHTMAN, CROMPTON, and BLACKBURN, JJ., concurred.

Judgment for defendant.

DUTTON v. HALLY. June 12.

Scotch Bankruptcy Act, 19 & 20 Vict. c. 79, s. 47.—Protection.—Meditatio fugae.—Capias.

1. The Bankruptcy (Scotland) Act, 1856, 19 & 20 Vict. c. 79, s. 47, enacts that a warrant granting protection shall protect the debtor from arrest in Great Britain and Ireland, and Her Majesty's other dominions, for civil debt contracted previous to the sequestration; but such warrant shall not be of any effect against the execution of a warrant of apprehension in mediatione fugae or ad factum præstandum, or for any criminal act: Held, that the exception extended to like process in England and Ireland and other parts of the Queen's dominions.

2. The defendant being about to leave this country for New Zealand, was arrested on a capias under stat. 1 & 2 Vict. c. 110, s. 3. The plaintiff had proved his debt in Scotland; and a warrant of protection had been granted to the defendant for a limited period, which had not elapsed when he was arrested: held, that the defendant was not entitled to be discharged.

IN this Term,

Archibald obtained a rule calling upon the plaintiff to show cause why the defendant should not be discharged out of custody on the ground that, previous to the arrest, the defendant's estate had been sequestrated in Scotland, and the plaintiff had proved his debt under the *sequestration; and also on the ground that, at the time of [*749] the arrest, the defendant was protected from arrest under The [**749] Bankruptcy (Scotland) Act, 1856, 19 & 20 Vict. c. 79; and why the plaintiff should not pay the costs of the application.

The defendant was indebted to the plaintiff in the sum of 649*l.* 18*s.* 5*d.* on two bills of exchange, drawn by the plaintiff and accepted by the defendant; and the plaintiff, believing that the defendant with his family was about to leave this country for New Zealand, caused him to be arrested on the 30th May, 1862, on a capias, obtained on an affidavit of the plaintiff, in pursuance of stat. 1 & 2 Vict. c. 110, s. 3.

On the 19th March, 1862, the defendant, who was resident and carrying on business as a merchant at Auchterarder in Scotland, presented, with the concurrence of a creditor, his petition to the sheriff of the county of Perth, under stat. 19 & 20 Vict. c. 79; and the sheriff in pursuance of sect. 13, awarded sequestration of his estate, and appointed the first meeting of his creditors for the election of a trustee and other purposes required by the Act, to be held on the 31st March; and the sheriff also then, in pursuance of sect. 44, granted his warrant for protection of the defendant's person from arrest or imprisonment for civil debt until that meeting.

The meeting was held on the day appointed, at which the majority in number and value of the creditors, and among them the mandatary for the plaintiff, were present, and a trustee of the defendant's estate was appointed, and the creditors who were present unanimously resolved that his protection should be renewed, under sect. 77, for four months from the 31st March, and an order was made by the sheriff accordingly. At that meeting the plaintiff, by his mandatary, proved his debt amounting to *649*l.* 18*s.* 1*d.* On the 19th April, the day appointed by the sheriff under sect. 87 for the examination of the bankrupt, he attended, and was examined by the solicitor for the trustee, and by the solicitor for the plaintiff's mandatary, and took the oath prescribed by sect. 95. At the date of his estate being sequestered, the debts of the bankrupt amounted to

about 6000*l.*, and his estate delivered up to the trustee consisted of property of the value of 6000*l.* Creditors whose debts amounted to 5092*l.* 17*s.* 1*d.* had proved and voted for the renewal of his protection.

The affidavit of the bankrupt stated, that having delivered up the whole of his estate to the trustee, and having passed his examination which was finally closed, and the trustee having expressed that he was satisfied with his conduct under the sequestration, he was, with the assistance of his friends, proceeding with his family to Auckland in New Zealand, with letters of accommodation, with the intention of establishing himself in business there, when he was arrested at the suit of the plaintiff; and that his intention was well known to the trustee and to the commissioners of his estate appointed under the sequestration, and to most (if not all) of his creditors; and that he was not leaving this country clandestinely, or with the intention of cheating or avoiding his creditors, but because he believed that it was no longer necessary for him to remain in this country as he had delivered up the whole of his property, and also given to the trustee and commissioners of his estate all the information in his power respecting the same, with which they had expressed themselves quite satisfied.

The affidavit of the trustee of the estate of the bankrupt stated that *751] the bankrupt had complied in all respects with *the requirements of stat. 19 & 20 Vict. c. 79, and that, he and the commissioners appointed under the sequestration having thoroughly investigated the affairs of the bankrupt previous to his passing his examination, and being satisfied that he had delivered up the whole of his estate for the benefit of his creditors, there was no necessity, according to the practice of the Scotch Courts, for him to remain any longer in this country; and that he and the commissioners were aware of the fact that the friends of the bankrupt had subscribed a sum of money for the purpose of enabling him and his family to emigrate to New Zealand, where the bankrupt had intimated to him and the commissioners it was his intention to proceed. There was an affidavit to the like effect by one of the commissioners.

The application was in the first instance made to Crompton, J., at Chambers, who referred the matter to the Court.

Upon the argument of the rule an affidavit of William Burns, who had been in practice as a writer, or solicitor, and procurator, before the sheriff and other Courts of Glasgow for twenty years, was produced, which stated as follows: "That it is the law and practice of the Courts in Scotland to grant a warrant, as in *meditatione fugæ*, against a sequestered debtor, on the application of any creditor of such debtor, who shall depose to the facts of the debt being due and of the debtor being about to quit Scotland without providing for payment of the debt; that it is no bar to the issuing of such a warrant that the creditor may have proved his debt or ranked in the sequestration; and neither is it any bar to such warrant that a protection under the statute has been given to the debtor; that by the Sequestration statute (19 & 20 Vict. c. 79, s. 47), it is expressly *752] enacted that a warrant of personal protection shall not be of any effect against the execution of a warrant and apprehension or imprisonment in *meditatione fugæ*, and no enactment of any kind exists to the effect that a creditor proving his debt, or ranking in the

sequestration, shall be held to pass from his right to use diligence, or procedure against the person of the debtor."

Bovill showed cause.—As to the first ground, the mere proof of his debt by the plaintiff in Scotland is no answer to an affidavit that the defendant is indebted to the plaintiff: it is no bar, according to the Scotch law, to an action in this country. This appears to have been a friendly bankruptcy, and therefore there is no hardship on the defendant.

As to the second ground. The defendant may be arrested under stat. 1 & 2 Vict. c. 110, s. 3, unless he is protected by the Scotch warrant, granted under The Bankruptcy (Scotland) Act, 1856, 19 & 20 Vict. c. 79, s. 44. The question is on the construction of sect. 47, which enacts that the warrant granting protection or liberation "shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland and Her Majesty's other dominions, for civil debt contracted previous to the date of sequestration, and all Courts of justice and Judges and all officers and gaolers shall be bound to give effect to such warrant; but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of apprehension or imprisonment in meditatione fugæ or ad factum præstandum, or for any criminal act." The expression "warrant of apprehension in meditatione fugæ," when applied to a party in England, must extend to the process here, which is similar or analogous; so that the protection and the *exception in the case of the debtor being about to quit the country shall be co-extensive. [*753 In Scotland the warrant in meditatione fugæ is granted to a creditor upon his swearing to his debt and his belief of an intention on his debtor's part to abscond; and upon that warrant the debtor is apprehended for examination. Such a warrant may be granted whenever there is an intention to leave Scotland, even although the debtor should have good reason for going and no fraudulent design: Bell's Dictionary and Digest of the Law of Scotland, "*Meditatio Fugæ.*" [CROMPTON, J.—According to our law the creditor must satisfy the Judge that the debt will be in danger, and then I doubt whether the Judge has a discretion; though, if there is abuse of the process of the Court, we should discharge the debtor: Stein *v.* Valkenbuysen, E. B. & E. 65 (E. C. L. R. vol. 96.)] In M'Gregor *v.* Fiskin, decided upon stat. 2 & 3 Vict. c. 41, s. 18, the Scotch Bankruptcy Act then in force, which is in the same terms as sect. 47 of The Scotch Bankruptcy Act, 1856, cited in M'Gregor *v.* Fiskin, 5 D. & L. 591, 594-5, 596, Parke, B., at Chambers, refused to discharge a Scotch debtor who was going to Canada, and Wightman, J., in the latter case in the Bail Court did not dissent from that; though he discharged the defendant, who was uncle of the defendant in the former case, on the ground that a mediated return to Scotland was not such a meditatione fugæ as was contemplated by the statute. [CROMPTON, J.—In M'Gregor *v.* Fiskin, 2 Exch. 226, 229, 5 D. & L. 722, before the Court of Exchequer, the point decided by my brother Wightman seems to have been doubted.] The defendant must appear again before his final discharge. [He referred to stat. 19 & 20 Vict. c. 79, ss. 146, 147. Philbrick, who was with him, was not called upon.]

*754] *Archibald, in support of the rule.—The plaintiff has elected to prove his debt in Scotland, and to take the benefit of the Scotch law. The warrant of protection is a protection against all arrests except those mentioned in the proviso to sect. 47 of stat. 19 & 20 Vict. c. 79. The words of that section imply that the bankrupt may legally be in other parts of Her Majesty's dominions besides Scotland without its being a fuga. And sect. 147 provides for the case of his being beyond the jurisdiction of the Lord Ordinary or sheriff at the time of his obtaining his final discharge. A capias under stat. 1 & 2 Vict. c. 110, s. 3, depends on very different principles from the warrant of apprehension in meditatione fugæ, which is confined to Scotland. In Bell's Dictionary and Digest of the Law of Scotland, by Ross, "Meditatio Fugæ," it is said: "When a creditor is in circumstances to make oath that his debtor, whether native or foreigner, is in meditatione fugæ in order to avoid the payment of his debt, or where he has reasonable ground for apprehending that the debtor has such an intention, it is competent for the creditor to apply to a magistrate, who, on inquiring into the circumstances, and finding reason to believe that the creditor's application is well founded, will grant a warrant for apprehending the debtor for examination; and may afterwards grant warrant to imprison him until he find caution judicio sisti." In Bell's Commentaries on the Laws of Scotland, 6th ed., by Shaw, p. 1087, it is said: "Upon this warrant the debtor is apprehended; and if it shall appear that he really means to leave Scotland, he must find security to the creditor de judicio sisti,—that is to say, that his person shall be found within the jurisdiction of our Courts upon decree being pronounced, and failing such security, he is committed to prison till he do so." In our law it is only necessary *to satisfy the Judge that the debtor is about to quit the country, and that the debt amounts to 20*l.* Sect. 89 provides for the case of a Scotch bankrupt being in England before his examination is completed, and for his being sent back to Scotland. [WIGHTMAN, J.—If the defendant had been in Scotland the warrant of protection would not have availed him.] The exception in sect. 47 was only intended to apply to Scotch process. The words "a warrant of apprehension or imprisonment in meditatione fugæ" are as exclusively descriptive of a Scotch writ as the words "a writ of capias ad respondendum" would be of an English writ; and such descriptions should, in favour of liberty, be strictly ascertained. Here there was no fuga from Scotland, for the defendant left that country with the knowledge and consent of the trustee of his estate and his creditors. The construction contended for by the plaintiff would involve this unreasonable result, that if the defendant having left Scotland was to reach New Zealand he would be safe from arrest so long as he remained stationary there, but liable to arrest if he attempted to proceed to another colony, and although if he succeeded in reaching the latter colony he would be privileged whilst stationary there, he would be liable to arrest if he attempted to return to New Zealand or England. Whatever property he acquires in New Zealand before his final discharge will, by the provisions of stat. 19 & 20 Vict. c. 79, be vested in the trustee to be divided among his creditors.

The affidavit as to the Scotch law merely echoes sect. 47 of The Scotch Bankruptcy Act, 1856.

WIGHTMAN, J.—I am of opinion that this rule ought to be discharged. It is not denied by the bankrupt that a debt owing by him to the plaintiff existed at one time, *whether he may or may not ultimately be discharged from it by the Scotch Bankruptcy Act, 19 & 20 Vict. c. 79. The question is whether, in respect of that debt, he is liable to arrest notwithstanding the warrant of protection granted to him under sect. 44? That depends upon the construction to be given to sect. 47, which enacts that the warrant granting protection or liberation "shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland and Her Majesty's other dominions, for civil debt contracted previous to the date of sequestration, and all Courts of justice and Judges and all officers and gaolers shall be bound to give effect to such warrant;" so that the operation of the warrant is most extensive; but it is subject to this exception, "such warrant of protection or liberation shall not be of any effect against the execution of a warrant of apprehension or imprisonment in meditatione fugæ or ad factum præstandum, or for any criminal act." It is said that this exception applies only to warrants in meditatione fugæ according to the law of Scotland. But when I look to the extensive nature of the protection granted I am not disposed to put so limited a construction upon it. It seems to me that, though the expressions in the proviso are such as are used in the Scotch law, the exception must be equally extensive with the protection granted in the former part of the section; and that the phrase "in meditatione fugæ," when applied to a debtor in England, is not to be construed according to the interpretation which it bears in the Scotch law, but according to what would be its meaning in English law; and therefore, the bankrupt having come to England, and relying on the protection granted under the first part of the section, is liable to a warrant of execution, or a warrant of apprehension if he meditates flight or quitting the country.

*CROMPTON, J.—I am of opinion that, according to the authorities, we ought to construe the words "warrant of apprehension in meditatione fugæ," in stat. 19 & 20 Vict. c. 79, s. 47, as extending to the writs in our law. I think that the Scotch lawyers, in drawing this statute, have used words of their own law to express what is common to the jurisdiction of English Courts as well as Scotch; and when, having framed a clause granting protection to a Scotch bankrupt in England and Ireland, they introduce exceptions, they naturally used a term of their own law to include similar cases according to English law. Moreover, *meditatio fugæ* is a strictly accurate expression, because it is the foundation of our process as well as theirs. The three cases excepted from the protection granted apply to and include cases of like nature in all the dominions of the Crown to which the protection itself extends. It would be monstrous if a debtor at Glasgow could be stopped, but if he got to the other side of the Solway, he could avoid his creditors. I think the meaning of the English Act of Parliament, 1 & 2 Vict. c. 110, s. 3, is that, if a debt is made out to be due, the creditor has a right to have the security of the body of his debtor for payment of the debt; and therefore this

was a valid arrest unless the bankrupt comes within the jurisdiction of the Scotch Bankruptcy Act. And then there is the great authority of Lord Wensleydale on this point in *M'Gregor v. Fisken*, which was not impugned when that case came into the full Court.(a) The enactment, being one to prevent a debtor who has obtained protection from being arrested in England as well as in Scotland, the spirit of it also is in favour of our view.

*BLACKBURN, J.—The defendant is a debtor about to quit
 *758] the country ; and, if that were all, the plaintiff, his creditor, would be entitled to arrest him ; and it is no element for our consideration whether the creditor is harsh or not in taking that step. Then comes the question whether, under sect. 47 of the Scotch Bankruptcy Act, the defendant is entitled to be discharged ? If the section had contained only the enacting part, he would have been entitled. Also, if the proviso means that the protection shall have no effect against a warrant of apprehension issued by a Scotch Court, the case is not within it, and the defendant would still be entitled to his discharge. But if it means that the protection shall not have effect against any warrant out of an English Court to the same effect as a warrant of apprehension in *meditatione fugæ*, this case is within it ; and, considering that sect. 47 is an enactment for protecting and liberating from arrest and imprisonment in every country in the Queen's dominions, we must construe the proviso as applying to warrants issued out of the Courts of any of those countries where the debtor happens to be when he is arrested, of the same nature and to the same effect as the warrant of apprehension in *meditatione fugæ* issuing out of the Scotch Courts. The Scotch warrant in *meditatione fugæ* is extremely similar to our *capias* issued on an affidavit that the debtor is about to quit the country : the debtor in England may give bail, which is like finding security *de judicio sisti* in Scotland ; so that the effect of the two warrants is the same.

Also our decision is not without authority ; for in *M'Gregor v. Fisken*, cited in *M'Gregor v. Fisken*, 5 D. & L. 591, 594–5, 596, Lord Wensleydale decided that where a Scotch debtor was going to Toronto, in Canada, from England, there *was a meditation of flight, within the exception in the section of the Scotch Bankruptcy Act then in force corresponding to sect. 47 of stat. 19 & 20 Vict. c. 79 ; in which latter case my brother Wightman held that an intention to go back to Scotland was not a meditation of flight on the part of the debtor, because it was going back to the country where the bankruptcy was pending, and to the jurisdiction which had granted him protection. The previous case of *M'Gregor v. Fisken* afterwards came before the Court of Exchequer.(a) The defendant had been arrested previously to protection being granted, and he had got the wrong form of warrant : but from what is reported as having fallen from the Lord Chief Baron and Lord Wensleydale, they doubted whether the distinction taken by my brother Wightman was right ; not whether the decision by Lord Wensleydale at Chambers was right, that the exception is not confined to the warrant of apprehension by its technical name, but extends to analogous writs issued out of an English Court. Being of the same opinion, I agree that this rule ought to be discharged.

Rule discharged, without costs.

(a) See 2 Exch. 226 ; 5 D. & L. 722.

PYM, Administratrix v. The GREAT NORTHERN RAILWAY COMPANY. June 17.

9 & 10 Vict. c. 93.—Pecuniary loss.—Reasonable expectation.—Damages.

1. An action on 9 & 10 Vict. c. 93, is maintainable in cases where none could have been maintained by the deceased if he had survived the effects of the injury : as the condition in the statute that the action could have been maintained by the deceased if death had not ensued, has reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default complained of.

2. Concessum, that in such an action, the damages must be based on pecuniary loss alone.

3. The extinction of a reasonable expectation of pecuniary advantage from the continuance of the life of the deceased, is a sufficient damage to maintain such an action.

4. Where the party killed was possessed of personality to the amount of about 3400*l.*, and was tenant for life of an estate in land, worth nearly 4000*l.* a year, with remainder to his eldest son in tail, and by settlement a jointure of 1000*l.* a year was settled on his wife, and 20,000*l.* secured to the younger children on his death, and the deceased died intestate ; held, that the widow and younger children had a sufficient expectation of pecuniary interest from the continuance of his life to render its loss the ground of an action.

5. In that case, the jury having given 13,000*l.* damages, i. e. 1000*l.* for the widow and 1500*l.* for each of the younger children : held, that this was excessive, and that the damages for each of the children ought to be reduced to 1000*l.*

THIS was an action, by an administratrix, brought under Lord Campbell's Act 9 & 10 Vict. c. 98.

On the trial, before Cockburn, C. J., at the Middlesex Sittings after Trinity Term, 1861, it appeared that the action was brought by the plaintiff, as widow and administratrix of a gentleman of fortune, on behalf of herself and their eight younger children, to recover compensation for the loss sustained by them in consequence of the death of the intestate, who was killed by an accident to a railway carriage of the defendants in which he was travelling, occasioned, as was alleged, by the negligence of the defendants, or their servants.

The circumstances of the deceased were as follows. He was tenant for life of an estate in land, the value of which was a little short of 4000*l.* a year. By the provisions of a settlement, executed in 1847, a jointure of 1000*l.* a year was settled on his wife, and a sum of 20,000*l.* was secured to the younger children on his death. The estate itself passed under the entail to his eldest son. The personal property amounted to about 3400*l.* He left eight younger children, all under twelve years of age.

The Lord Chief Justice left to the jury to say whether the death of the deceased was occasioned by the negligence of the defendants or their servants : and told them that, in estimating the amount of damages, they must not take *into consideration any pain of mind [*761 or wounded feeling caused to the widow or children by the death, and must assess damages solely as compensation for pecuniary loss sustained by them in consequence of it. He told them that they might take into consideration the loss of the advantages of superior education, social position and personal comforts, of which the father's income, had he lived, would have secured the benefit and enjoyment to the family ; and also the loss of that provision, which it was to be presumed that the deceased, as a prudent father of a family, would have made by saving from his income for the benefit of his wife and younger children.

The jury found a verdict for the plaintiff, damages 13,000*l.*; apportioning 1000*l.* for the widow, and 1500*l.* for each of the younger children. No compensation was awarded to the eldest son, he having succeeded to the landed property of the deceased under the entail.

In Michaelmas Term, 1861,

Hawkins obtained a rule, in pursuance of leave reserved, to enter a verdict for the defendant, or a nonsuit, on the ground that there was no cause of action established by the evidence; or for a new trial, on the ground that the damages were excessive.

The rule was argued, in Easter Term, on the 12th May, 1862, before Cockburn, C. J., Crompton, Blackburn, and Mellor, JJ.

The 9 & 10 Vict. c. 93, entitled "An Act for compensating the families of persons killed by accidents:" after reciting that "no action at law is now maintainable against a person who by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the *wrong-doer in such case should be answerable in damages for the injury so caused by him," enacts:

Sect. 1. "Whosoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Sect. 2. "Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury shall find and direct."

Bovill, *Lush*, and *Garth* showed cause.—First. It may be conceded that an action on this statute can only be maintained for *pecuniary* loss; and the other side will contend that as the deceased, in the event of his surviving the accident, could not have recovered for *pecuniary* loss, his personal representative cannot do so.

*It is a misconception of this statute to look on it as continuing to the personal representatives a right of action previously vested in the deceased;—on the contrary its object was to give them a new species of action. This appears from the title, which declares the statute to be "for compensating the families of persons killed by accident;" and also from its not giving a right of action for the benefit of the relations of the deceased generally, but only of those within certain specified degrees. Besides, no part of the money recovered goes to the estate of the deceased or to his creditors. Where a tenant for life of land, or an annuitant, or a person holding an appointment abroad, is killed, his family suffer *pecuniary* loss by his

death, although if he had survived he could not have maintained an action for pecuniary loss. Moreover, where an accident does not prove fatal, the injured party may recover damages against the wrong-doer for the personal suffering sustained by him in consequence of it, a thing which the personal representatives clearly cannot do.

As to what is a sufficient pecuniary interest to bring a case within this statute. In *Dalton v. The South Eastern Railway Company*, 4 C. B. N. S. 296 (E. C. L. R. vol. 93), it was held that legal liability alone is not the test of injury in respect of which damages may be recovered in an action on it; but the reasonable expectation of pecuniary advantage by the relative remaining alive may be taken into account by the jury, and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned. *Franklin v. The South Eastern Railway Company*, 3 H. & N. 211, and *Blake v. The Midland Railway Company*, 18 Q. B. 93 (E. C. L. R. vol. 83), are to the same effect. [*764 *[CROMPTON, J.—So is *Duckworth v. Johnson*, 4 H. & N. 653. There was also a case tried before me at Liverpool, I think, in 1857, arising out of the death of a young girl who earned money at a factory, in which I ruled in the same way, and the Court approved my view.(a)] In the present case, admitting that a parent is not under any legal obligation to make provision for his children, it is matter of reasonable expectation on their part that he will pay for their maintenance, clothing, education, and putting them out in the world.

Secondly. The amount of the damages is peculiarly within the province of the jury, and the Court will never interfere unless they can clearly see that the amount is out of all proportion to the injury.

Hawkins, *Phipson*, and *Holl*, in support of the rule.—First. The action maintainable on this statute by the personal representatives is a mere continuance of that which would have accrued to the deceased had he lived, and the damages in both must be of the same character. This appears from the recital, and also from sect. 1, which says that an action for damages may be maintained, “*notwithstanding the death of the person injured.*” [CROMPTON, J.—No. Suppose the deceased lived for some time after the accident, he could recover for pain and suffering to himself, the personal representatives could not.] The statute must receive qualification so far. At the common law, the personal representatives could bring no action for injury to the property of the testator. This was remedied by 4 E. 3, c. 7, with respect to “personalty, and the 3 & 4 W. 4, c. 42, s. 2, as to real estate; [*765 but it has always been held that it must appear that the estate was diminished. [CROMPTON, J.—Those statutes supply no analogy, for under them the damages recovered are for the benefit of the creditors. BLACKBURN, J.—If a man who has a life annuity is killed, it would be a contradiction in terms to say that he could have recovered had he lived: but cannot his personal representatives recover in such a case?] The general principle respecting damages is laid down in *Hadley v. Baxendale*, 9 Exch. 341, that they must be such as may

(a) Perhaps *Bramall v. Lees*, mentioned by *Aspland, Amicus Curiae*, in *Dalton v. The South Eastern Railway Company*, 4 C. B. N. S. 296, 302 (E. C. L. R. vol. 93), and reported in 29 Law Times 82, 111, 166.

fairly and reasonably be considered either arising naturally, i. e. according to the usual course of things, or such as may reasonably be supposed to have been in the contemplation of both parties to the contract. The construction contended for by the other side would render the right of the children to compensation under the statute dependent on the fact whether the deceased made a will; and the probability of a man making one is not a matter fit to be taken into consideration by a jury. It would be most serious to Railway Companies if actions like the present could be maintained.

Secondly. The amount of the damages is excessive. The jury must have proceeded on a wrong principle, seeing that they awarded the same sum to each of the children; whereas, in consequence of the difference in their ages, the probable expenditure of each to their father had he lived must have greatly differed.

Cur. adv. vult.

The judgment of the Court was now delivered by

COCKBURN, C. J.—In this case it was objected on the part of the defendants, first, that the plaintiff was not *entitled to recover *766] in point of law; secondly, that, even if the plaintiff was entitled to recover, the damages were excessive. [His Lordship here stated the facts.]

The heads of loss mainly relied on by the plaintiff were, first, the loss of the advantages of superior education, and of the social position and personal comforts of which the father's income, had he lived, would have secured the benefit and enjoyment to the family; secondly, the loss of that provision which it was to be presumed that the deceased, as a prudent father of a family, would have made by saving from his income, for the benefit of his wife and younger children.

The jury, who were properly directed, if they considered the fact of negligence as established, to estimate the damage with reference to pecuniary loss alone, assessed the damages at 18,000*l.*, being 1000*l.* for the widow, and 1500*l.* for each of the children.

It is objected, on the part of the defendants, that, independently of the amount of damages, the verdict cannot stand; first, because the case does not come within the terms of the statute 9 & 10 Vict. c. 93; secondly, because the loss, even if a pecuniary loss at all, is in the present instance too uncertain and remote to be properly the subject of compensation under the statute.

In support of the first of these grounds of objection, the language of the first section of the Act was relied on; and it was contended that, inasmuch as if death had not ensued from the effects of the accident, the deceased could have had no right of action against the Company in respect of a pecuniary loss arising only on his death, this action could not be maintained by his representative, inasmuch as the right of action is given only where the deceased could have maintained an action if death had not ensued.

*We were at first struck with this argument, but, on consideration, we are of opinion that the condition that the action could have been maintained by the deceased if death had not ensued, has reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default complained of. Thus, if the

deceased had, by his own negligence materially contributed to the accident whereby he lost his life, as he, if still living, could not have maintained an action in respect of any bodily injury, notwithstanding there might have been negligence on the part of the defendants, the present action could not have been supported. But supposing the circumstances of the negligence to have been such that, if death had not ensued, the deceased might have brought his action in respect of any injury arising to him from it, we are of opinion that his representative may maintain an action in respect of an injury arising from a pecuniary loss occasioned by the death, although that pecuniary loss would not have resulted from the accident to the deceased had he lived. This being the view we take of the effect of the condition contained in the Act, we are of opinion that this objection to the plaintiff's right of action fails.

As to the second head of objection, we are of opinion that as the benefit of education and the enjoyment of the greater comforts and conveniences of life depend on the possession of pecuniary means to procure them, the loss of these advantages is one which is capable of being estimated in money, in other words, is a pecuniary loss; [*768] and therefore the loss of such advantages arising from the death of a father whose income ceases with his life is an injury in respect of which an action can be maintained on the statute. A fortiori, the loss of a pecuniary provision, which fails to be made owing to the premature death of a person by whom such provision would have been made had he lived, is clearly a pecuniary loss for which compensation may be claimed.

It is true that it must always remain matter of uncertainty whether the deceased person would have applied the necessary portion of income in securing to his family the social and domestic advantages of which they are said to have been deprived by his death; still more, whether he would have laid by any and what portion of his income to make provision for them at his death. But, as it has been established by the cases decided upon this statute, that, if there be a reasonable expectation of pecuniary advantage, the extinction of such expectation by negligence occasioning the death of the party from whom it arose will sustain the action, it is for a jury to say, under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages in such an action.

The matter having, in the present instance, been thus left to the jury, and the issue having been found by them for the plaintiff, we see no reason for disturbing the verdict so far as the right of the plaintiff to maintain the action in point of law is concerned.

We are not insensible to the argument *ab inconvenienti*, founded on the very serious consequences which might ensue to a railway company in the event of a fatal accident happening from negligence to an individual of very large fortune. But we think this is rather for the consideration of the Legislature, as to whether any limit should be put to the liability, than for us. We see no difference in principle between such a case as the present and that of a claim by the family of an artisan for the loss of the advantages arising from their

father's earnings, in which case it is not doubted that the action may be maintained.

As regards the amount of damages, we are led to think that the sum awarded by the jury is too large. Considering that, by the settlement, provision is already made on the father's death for the widow and children, that it is uncertain how far the deceased would have added to their provision by saving from his income for their benefit, and that any such provision, whether under the settlement or otherwise, would not have come to them till the father's death, while, on the contrary, both the money secured by the settlement and the compensation awarded by the jury now become realized at once, we think the amount of the damages, so far as the children are concerned, too large. We suggest that, while the sum awarded to the widow should stand, the amount awarded to the children should be reduced from 1500*l.* to 1000*l.* If this should be assented to on the part of the plaintiff, the verdict will be reduced to 9000*l.* and the rule will be discharged; if not, the rule will be absolute for a new trial, on the ground that the damages found by the jury are excessive.

The plaintiff's counsel then consented to reduce the damages accordingly.

Rule discharged.

The Pennsylvania statute of April 26th 1855 resembles the Act of 9 & 10 Vict. c. 93, upon which the action in the principal case was brought, and the English decisions have been relied upon in interpretation of the meaning to be attributed to the Pennsylvania statute. Thus in an action by the parents for the loss of a son, who was struck by a locomotive, as he was getting off the cars on the wrong side, and killed, the damage was held to be limited to the pecuniary loss which was occasioned to the plaintiffs by the death of their son: Pa. Railroad Co. v. Zebe, 9 Casey (Pa. 1858) 318-327; Pa. Railroad Co. v. Henderson, 1 P. F. Smith (Pa. 1865) 315. In an action by the children for the loss which they suffered by the death of their father, Sharswood, J., said: "After an attentive examination and review of all the cases which have hitherto been decided, we are of opinion that the proper measure of damages is the pecuniary loss suffered by the parties entitled to the sum to be recovered—in this instance the children of the

decedent—without any solatium for distress of mind; and the loss is what the deceased would have probably earned by his intellectual or bodily labour in his business or profession during the remainder of his lifetime, and which would have gone for the benefit of his children, taking into consideration his age, ability, and disposition to labour, and his habits of living and expenditure:" Pa. Railroad Co. v. Butler, 7 P. F. Smith (Pa. 1868) 335. In an action by the party injured for compensation, the same eminent judge said: "The general rule in actions on the case for negligence is, that the party aggrieved is entitled to recover only to the extent of his actual injury. In the case of a suit by the party injured himself, it may, no doubt, include a reasonable compensation for pain and suffering, as well as the expense of medical attendance and the loss of time consequent upon confinement:" Pa. Railroad Co. v. Books, 7 P. F. Smith (Pa. 1868) 339.

*FISHER v. PROWSE. June 16.

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COOPER v. WALKER.

Highway.—Obstruction.—Dedication.—Metropolis Local Management Act, 18 & 19 Vict. c. 120.

1. Where an erection or excavation exists upon land, and the land on which it exists, or to which it is contiguous, is dedicated to the public as a highway, the dedication must be taken to be made to the public and accepted by them, subject to the inconvenience or risk arising from the existing state of things.

2. The defendant occupied a house adjoining to a public street, with a cellar belonging to it, which cellar had existed before the defendant had anything in the house. The mouth of this cellar opened into the footway of the street by a trap door. During the day this trap door was open, but at night it was closed by a flap, which slightly projected above the footway, and it had so projected as long as living memory went back. The plaintiff, coming along the footway at night, stumbled over this flap, fell, and sustained injury, for which he brought an action. Held, that the jury ought to draw the conclusion that the cellar flap had existed as long as the street, and that the dedication of the way to the public was with the cellar flap in it, and subject to its being continued there; and, therefore, that the defendant was not liable, as the maintenance of such an ancient cellar flap was not unlawful.

3. Declaration for negligently and improperly placing in a public street certain steps, so that the same were an obstruction to persons using the street, and dangerous to persons passing along it at night; and averring that the plaintiff, passing along the street, fell over them and was injured. Plea, that the street was subject to the right of the occupiers of a house adjoining it to have steps standing in the highway and leading up to the outer door of the house, all persons passing along the highway being entitled to pass on foot over the steps as a part of the highway which steps were part of the house; that, the street being lowered under The Metropolis Local Management Act, 18 & 19 Vict. c. 120, the old steps were necessarily removed, and the present steps placed in their room; that the new steps were placed on the same part of the highway on which the old steps had stood and caused no greater obstruction or danger than did the old steps. Held that plea was good, as the former highway was subject to the right on the part of the occupiers of the defendant's house to keep these steps there, and the lowered highway was subject to a similar right.

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THE declaration stated that the defendant unlawfully, carelessly and negligently kept, maintained and continued an area cover, or cellar flap, raised and projecting over and upon a public street or highway, so as to be dangerous to and likely to injure, and the same was dangerous to and likely to injure, persons lawfully passing in and along, and using the said street or *highway; by reason of [*771] which premises the plaintiff, who was lawfully passing in and along and using the said street or highway, walked on and tripped upon and against the said area cover or cellar flap, and thereby he was cast and thrown down to and upon the ground, and one of his arms became and was dislocated, and the ligaments of one of his shoulders were lacerated, &c.

First plea. Not guilty. There were two other pleas traversing allegations in the declaration.

Issues thereon.

On the trial, before Erle, C. J., at the Maidstone Spring Assizes in 1861, it appeared that the defendant was occupier of a house adjoining to a public street, with a cellar belonging to it; which cellar had existed before the defendant had anything in the house. The mouth of this cellar opened into the footway of the street by a trap door. During the day this trap door was open, but at night it was closed by a flap which slightly projected above the footway. The plaintiff

coming along the footway at night stumbled over this flap, fell, and sustained injury, for which he brought this action.

At the close of the plaintiff's case, the Chief Justice directed a non-suit, but gave leave to the plaintiff to move to enter a verdict for 75l., it being "to be taken as proved that, as long as living memory went back, the flap had been as described in the evidence."

In the following Easter Term,

Parry, Serjt., obtained a rule nisi accordingly, citing *Coupland v. Hardingham*, 3 Camp. 398, and *Barnes v. Ward*, 9 C. B. 392 (E. C. L. R. vol. 67).

The rule was argued at the Sittings in Banc after Trinity Term, June 13th, 1861; before Cockburn, C. J., and Blackburn, J., and *772] in the following Michaelmas *Term, November 4th, before Cockburn, C. J., Crompton, Blackburn and Mellor, JJ.

Joseph Brown showed cause.—First. The defendant is not responsible for the accident;—there was no evidence of negligence on his part, nor proof that the mischief which happened was one which could have been foreseen by him: *Cornman v. The Eastern Counties Railway Company*, 4 H. & N. 781, 785, 786, per Martin and Bramwell, BB.; *Toomey v. The London, Brighton and South Coast Railway Company*, 3 C. B. N. S. 146, 150 (E. C. L. R. vol. 91), per Williams and Willes, JJ.

Secondly. The cellar with the flap having existed from time immemorial as it was when the accident happened, the presumption is that the highway was dedicated with the flap in it. The dictum of Lord Ellenborough in *Coupland v. Hardingham*, 3 Campb. 398, which seems to the contrary, was not confirmed in *Barnes v. Ward*, 9 C. B. 392 (E. C. L. R. vol. 67), nor in *Cornwell v. The Metropolitan Commissioners of Sewers*, 10 Exch. 771, 774, 775. What would be an obstruction if newly erected on a highway is lawful if it be ancient: 1 Russ. on Crimes, by Greaves, 3d ed., p. 347, citing 1 [2] Hawk. P. C. [by Leach], book I., ch. 75, s. 9, and ch. 76, s. 146; *Bateman v. Burge*, 6 C. & P. 391 (E. C. L. R. vol. 25), 16 Vin. Abr. 27, *Nusance* (G), pl. 18 in margin, citing *Lill. Pr. Reg. Nusance*, 246, in which Robins's Case, Trin. 8 W. 3 C. B. is cited. [He also cited *Hardcastle v. The South Yorkshire Railway and River Dun Company*, 4 H. & N. 67, *Blyth v. Topham, Cro. Jac.* 158, *Hounsell v. Smyth*, 7 C. B. N. S. 731 (E. C. L. R. vol. 97).]

The plaintiff in person supported the rule.

Cur. adv. vult.

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*COOPER v. WALKER.

The declaration alleged that the defendant wrongfully, negligently and improperly placed, and caused to be placed, in a public street or thoroughfare, called Christopher Street, certain stone steps, so that the same became and were an obstruction and hindrance to persons using the street, and dangerous to persons passing along it at night; and that the plaintiff was passing along the street by night, as she lawfully might, after the said stone steps had been so placed by the defendant in the street, and had been left unguarded and unfenced by him, whilst they were dangerous to persons passing along the said street by night, when her foot struck against the stone steps; and the plaintiff was, by means

of the premises, and of the negligent, wrongful and improper conduct of the defendant in that behalf, thrown down, and her thigh was broken, &c.

Pleas. First, not guilty; second, except as to the negligence alleged, that the said highway, before and at the time when it was lowered as thereafter mentioned, and at the time of, &c., was subject to the right of the occupiers for the time [being] of a house adjoining it, to have steps standing in the highway on a certain part thereof, and leading up to the outer door of the said house for the convenient occupation thereof, all persons passing along the highway being entitled to pass on foot over the said steps, as part of the said highway, but not to remove the steps, the highway being at the part thereof which was occupied by such steps a way for foot passengers over the said steps, which steps were part of the said house. That before the said time when, and while the said highway *was such an high-way as aforesaid, and so subject as aforesaid, and while certain old steps were lawfully standing on the said part of the said highway leading to the said outer door for the convenient occupation of the said house, being the steps which the occupier of the house had a right to have there as aforesaid, the vestry of the parish of St. Matthew, Bethnall Green, wherein the said highway was situate, having lawful authority [so] to do, and under and by virtue of the Act of Parliament for the local management of the metropolis (18 & 19 Vict. c. 120), lowered the level of the said highway round the said part of the said highway, whereby it became necessary for the convenient occupation of the said house, that the old steps leading to the outer door thereof as aforesaid should be taken down, and other steps placed in the said part of the said highway, so as that none of the steps leading to the said outer door should be of an inconvenient height, as one of the old steps would have been after the said lowering; whereupon the defendant, for the making of the steps to the said outer door convenient for the occupation of the said house, did at the request and by the authority of the occupier of the said house, who was also in possession of the said steps as part thereof, take down the old steps, and place steps on the said part of the said highway on which the old steps stood as aforesaid, such new steps being steps leading to the said house for the convenient occupation of the said house, and conveniently constructed for the purpose aforesaid, and in all respects lawfully constructed. That the taking down the old steps and the placing of new steps as aforesaid, of the construction aforesaid, was all done with the sanction, consent, approbation and authority of the said vestry. That the new steps were *proper steps to be so placed in the said part of the said highway as aforesaid, for the purpose aforesaid, and caused no greater obstruction, hindrance, inconvenience or danger to persons passing along the lowered highway than did the old steps cause to persons passing along the highway before it was lowered. [*775]

Issues thereon.

On the trial, before Hill, J., at the Middlesex Sittings after Trinity Term in 1861, the jury found a verdict for the plaintiff on the plea of not guilty, and for the defendant on the issue joined on the second plea. In the following Michaelmas Term (November 2d),

Woollett obtained a rule calling upon the defendant to show cause

why the judgment should not be entered for the plaintiff on the second plea non obstante veredicto.

The rule was argued, in Easter Term, May 13th, 1862; before COCKBURN, C. J., CROMPTON, BLACKBURN and MELLOR, J.J.

Mills and *H. James* showed cause.—It must be supposed that the street was dedicated to the public, subject to the right of the occupier of the defendant's house to have steps standing there; and the defendant had a right to replace them after they had been removed for the purpose of lowering the street. The public have still the same use of the street which they have ever had, or which they have a right to. [They referred to stat. 18 & 19 Vict. c. 120, s. 98, and cited *Le Neve v. The Vestry of Mile End Old Town*, 8 E. & B. 1054 (E. C. L. R. vol. 92), on sects. 119 and 120 of the same statute, *Wellbeloved on Highways* 440, *Jarvis v. Dean*, 3 Bing. 447 (E. C. L. R. vol. 11), s. c. 11 B. Moo. 392; *Elwood v. Bullock*, 6 Q. B. 383 (E. C. L. R. vol. 51), and *Lethbridge v. Winter*, 1 Campb. 263, note (b).

**Woollett*, in support of the rule.—There cannot be a dedication of a highway with a right to maintain upon it an obstruction which would be a nuisance at common law; consequently, the jury having found a verdict for the plaintiff upon the plea of not guilty, the allegation in the declaration that these steps were dangerous, and therefore a nuisance at common law, must be taken to have been proved. [He cited 1 Hawk. P. C., by Curwood, p. 700, book 1, ch. 32, s. 8, referring probably to *Reg. v. Watts*, 1 Salk. 357; *Morant v. Chamberlain*, 6 H. & N. 541; *Coupland v. Hardingham*, 3 Campb. 398; *Jacob Hall's Case*, 1 Vent. 169.] *Cur. adv. vult.*

BLACKBURN, J. (June 13th), delivered the judgment of the Court.
The decision in both these cases depends upon the same question of law.

[His Lordship, after stating the facts and the reservation at the trial in *Fisher v. Prowse*, proceeded.] A rule nisi to enter the verdict for the plaintiff was obtained; against which cause was shown by Mr. Brown in the Sittings after last Trinity Term, before my Lord and myself, the plaintiff appearing in person in support of the rule in Michaelmas Term.

We think we must, on this reservation, coupled with the evidence, take it to have been proved that there was no negligence on the part of the plaintiff contributing to the accident, and that the flap did cause obstruction to the footway to such an extent that if the flap had been put down for the first time, after the highway was dedicated to the public, it would have been a nuisance for the consequences of **777*] which those who maintained *the nuisance would have been responsible. On the other hand, we must take it to have appeared that the flap continued in its original condition, and that the defendant had not altered it or suffered it to get out of repair, so as to increase the danger and obstruction beyond what always must have existed since it was there. And we think that, on its being shown that the cellar flap had existed in its present condition as far back as living memory went, the jury ought to draw the conclusion that it had existed as long as the street, and that the dedication of the way to the public was with this cellar flap in it, and subject to the reservation of its being continued there, so far as by law the highway

could be subject to it. It seems to us, therefore, that the question reserved was whether, after the dedication of the highway, the maintenance of such an ancient cellar flap was unlawful.

During the pendency of the rule in this case of *Fisher v. Prowse*, a rule nisi had been obtained in the other case of *Cooper v. Walker*, and as the same question arose in that case, we delayed judgment in *Fisher v. Prowse* till after the case of *Cooper v. Walker* should have been argued.

In *Cooper v. Walker* the plaintiff declared against the defendant for negligently and improperly placing in a public street certain stone steps, so that the same became and were an obstruction and hindrance to persons using the street, and dangerous to persons passing along it at night, and averred that the plaintiff, passing along the street, fell over them and was injured. The defendant, in addition to the plea of not guilty, pleaded a second plea, on which the present question arises.

This plea was that the street was subject to the right *of the [*778] occupiers of a house adjoining it to have steps standing in the highway on a part thereof, and leading up to the outer door of the said house, all persons passing along the highway being entitled to pass on foot over the said steps as a part of the highway, but not to remove the said steps, the highway being at the part thereof which was occupied by such steps a way for foot passengers over the said steps, which steps were part of the said house. The plea then proceeded to show that the street was lowered under the Metropolis Local Management Act, 18 & 19 Vict. c. 120; that, in so doing, the old steps were necessarily removed, and the present steps placed in their room; and it was averred that the new steps were placed on the same part of the highway on which the old steps had stood, and nowhere else; and that they were proper steps, and caused no greater obstruction, hindrance, inconvenience, or danger to persons passing along the lowered highway than did the old steps to persons passing along the highway before it was lowered. Issue was joined on these pleas.

On the trial, before my brother Hill, the jury found for the plaintiff on the plea of not guilty, but for the defendant on the second plea. Mr. Woollett, having obtained a rule nisi for judgment non obstante veredicto, cause was shown against this rule in last Term, before my Lord Chief Justice, my brothers Crompton and Mellor, and myself. No damages had been assessed at the trial; so that, if we thought the plea bad after verdict, the rule could not have been made absolute in this form, though probably it might have been moulded so as to afford an opportunity for a new trial; but this we need not consider, as we are of opinion that the plea is good.

It was hardly disputed on the argument before us, that if the former highway was subject to a right on the *part of the [*779] occupiers of the defendant's house to keep steps in it without their being, although to some extent obstructing the highway, a nuisance or illegal, the lowered highway must be subject to a similar right: the main contention was that no such right could exist in law.

The plea of not guilty having been found for the plaintiff, we must take it to have been proved that the steps in question were so far an

obstruction and hindrance and dangerous to passengers that, if they had been placed on the highway after its dedication, they would have been improper and a nuisance, so that the party placing them there would have been responsible for any damage thence arising. We must construe the plea as confessing this, but avoiding it by showing that the highway was subject to the right to keep such steps there, and we think that, after verdict, this is sufficient, if in point of law there can be such a private right in a highway. This depends on the same principle as *Fisher v. Prowse*.

The law is clear that, if after a highway exists anything be newly made so near to it as to be dangerous to those using the highway—such, for instance, as an excavation, *Barnes v. Ward*, 9 Com. B. 892 (E. C. L. R. vol. 67), this will be unlawful and a nuisance; as it also is if an ancient erection, as a house, is suffered to become ruinous, so as to be dangerous, *Reg. v. Watts*, 1 Salk. 357; and those who make or maintain the nuisance in either case are liable for any damage sustained thereby, just as much as if the nuisance arose from an obstruction in the highway itself; but the question still remains, whether an erection or excavation already existing, and not otherwise unlawful, becomes unlawful when the land on which it exists, or *780] to which it is *immediately contiguous, is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be; or whether, on the contrary, the dedication must not be taken to be made to the public, and accepted by them, subject to the inconvenience or risk arising from the existing state of things. We think the latter is the correct view of the law. It is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere user. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired; it would be doubly so if the consequence were that he was bound to fill up or fence off his canal.

*781] The question whether the owner of the soil is under *such an obligation arose in *Cornwell v. The Metropolitan Commissioners of Sewers*, 10 Exch. 771. Alderson, B., there says, p. 774, "Suppose there is an enclosed yard, with several dangerous holes in it, and the owner allows the public to go through the yard, does that cast on him any obligation to fill up the holes? Under such circum-

stances caveat viator." And Parke, B., says, "This is not the case of a new sewer, and therefore we may dispense with the consideration of what the Commissioners are bound to do when they make a sewer. This is an ancient sewer, which has existed with the highway time out of mind, and therefore the public have only a right to the highway subject to the sewer."

The case of Coupland v. Hardingham, 8 Campb. 398, on which the plaintiffs in the present case principally relied, was cited in the argument in Cornwell v. The Metropolitan Commissioners of Sewers, 10 Exch. 771. Martin, B., observes on it, p. 775, that "in all probability the road" in that case "had been used long before the house was built." The statement of facts in the report in 8 Campb. 398 is perhaps scarcely consistent with this explanation, as it is there stated that "the premises had been exactly in the same situation as far back as could be remembered, and many years before the defendant was in possession of them." But Lord Ellenborough seems to have directed his attention principally to the part of the proposed defence grounded on the fact that the defendant did not himself erect what was alleged to be a nuisance. His ruling on that was that he who maintains a nuisance is as much responsible as if he had erected it. If his attention was called to the other part of the defence, which, from the report, seems to have been raised on the facts, and he held that, though the area had existed with the highway time out of mind, *the public had a right to the way, not subject to the area, his holding is inconsistent with the judgment of the Exchequer, and, being only a holding at nisi prius, though by a very great Judge, it must yield in point of authority to a judgment in banc. In Jarvis v. Dean, 3 Bing. 447 (E. C. L. R. vol. 11),^(a) the report leaves it uncertain whether the area in that case existed before the dedication of the way or not. As it is stated to have belonged to an unfinished house, it probably had not been long in existence, and as Best, C. J., states, in his judgment, p. 448, that the way had been a public thoroughfare for many years, it seems that the way must have been more ancient than the area, and that the present point could not therefore have been raised. It certainly does not appear to have been raised, and no opinion is given on it.

There is no other authority that has been brought to our notice that conflicts with the decision of the Court of Exchequer. In Barnes v Ward, 9 Com. B. 392 (E. C. L. R. vol. 67), the judgment is carefully worded. The Court there say, p. 420, "The result is,—considering that the present case refers to a *newly made* excavation adjoining an *immemorial* public way, &c." This is not a decision that the case would have been different if the way had been more recent than the excavation, but it rather implies that such was the leaning of the Court. In Morant v. Chamberlin, 6 H. & N. 541, though it was unnecessary to decide the point, the Court of Exchequer state that it was the inclination of their opinion, that the dedication of a highway might in point of law be made subject to the reservation of a private right to some extent interfering with the public way.

As was pointed out in the course of the argument, there are in

(a) See s. c. 11 B. Mo. 354.

*783] many towns ancient streets in which steps *descending from the houses are a permanent obstruction to the passengers; while in the foot pavements there are often flap doors opening into vaults and cellars, and plates opening into coal cellars, which, when opened, offer a temporary obstruction to the use of the way, and which, therefore, unless justified as having been reserved as of right on the dedication of the way, would obviously be illegal. So, in the country, there are innumerable footways which would be much more convenient if the ancient stiles were removed or even lowered. Yet it has never been held, or even suggested, that such things are illegal and might be removed as nuisances; and it seems difficult to say how they can be legal on any other principle than that the way has been dedicated subject to them.

For these reasons we think that in both cases the rule must be discharged.

Rule discharged in both cases.

MACFARLANE v. NORRIS. June 10.

Lex loci contractus.—Lex fori.—Set-off.—Scotch law.—Mutual credit.—Bankruptcy.

1. Questions of procedure are to be determined by the lex fori, not by the lex loci contractus. 2. *Sembly*, that set-off is matter of procedure, and, as such, determinable by the lex fori.

3. The plaintiff sued as trustee of the estate and effects of a bankrupt in Scotland, under a sequestration in that country; for money received for the use of the plaintiff as trustee after the bankruptcy, and for interest due from the defendant to the plaintiff as trustee after the bankruptcy. The defendant pleaded that, before he had notice of the bankruptcy, and before the sequestration, he gave credit to the bankrupt by becoming the endorsee and holder bona fide, within the meaning of the Scotch law, of a bill of exchange drawn by M. & Co. upon the bankrupt for the sum, &c., and accepted by the bankrupt, which bill became payable after the bankruptcy, and "which credit so given was a credit of a nature likely to end in a debt from the bankrupt to the defendant, and the amount of the said acceptance was, at the time of the commencement of this suit, and still is, due to the defendant, and, together with interest thereon, equals the plaintiff's claim: and the bankrupt gave credit to the defendant by consigning goods to him for sale for the said bankrupt, and upon the terms that the proceeds should be remitted and paid to the bankrupt in Scotland: and that the money sought to be recovered by the plaintiff is the proceeds of and money arising from the sale of the said goods under and according to the terms of the said consignment, and which said consignment was of a nature likely to end in a debt from the defendant to the bankrupt: and the defendant says that he is ready and willing, and hereby offers, to set off the amount so due to him, the defendant, as endorsee and holder of the said bill of exchange as aforesaid, against the claim of the plaintiff in respect of the matter herein pleaded to, and that, by the law of Scotland, he is entitled so to do, and such set-off forms an answer to the plaintiff's claim;" held, that the plea was good.

THE declaration stated that this was an action by the plaintiff, as trustee of the estate and effects of J. Park, a bankrupt in Scotland, under a sequestration of the estate and effects of Park, by virtue of the statutes relating to bankrupts in Scotland and the sequestration of the estate and effects of bankrupts in Scotland, against the defendant, for money payable by the defendant to the plaintiff as trustee as aforesaid: (1) for goods sold and delivered by Park before his bankruptcy and the said sequestration, to the defendant at his request: (2) and for money received by the defendant for the use of Park before the bankruptcy and sequestration: (3) and for money paid by Park for the defendant, at his request, before the bankruptcy and sequestration: (4) and for interest upon moneys due from the defendant to Park, and by him before his bankruptcy and sequestration for-

borne to the defendant at his request: (5) and for moneys found to be due from the defendant to Park on accounts stated between them before the bankruptcy and sequestration: (6) and for money received by the defendant for the use of the plaintiff as trustee after the bankruptcy: (7) and for interest upon money due from the defendant to the plaintiff as trustee after the bankruptcy, and by him as trustee forbore to the defendant at his request for long terms: (8) and for moneys found to be due on accounts stated after the bankruptcy between the plaintiff, as trustee, and the defendant. The declaration [*785 concluded with an averment that all matters happened before the suit to vest in the plaintiff and constitute him trustee of the estate and effects of Park, and to entitle him to sue and to recover in this action: and the plaintiff, as trustee as aforesaid, and by virtue of the said statutes, claimed 5000l.

The fourth plea was as follows: "The defendant, as to the sum of 311l. 17s. 6d., parcel of the money claimed in the sixth and seventh counts of the declaration, says that, before he had notice that the said J. Park had become bankrupt, and before any sequestration of the estate and effects of the said J. Park, the defendant gave credit to the said J. Park by becoming the endorsee and holder bona fide, within the meaning of the Scotch law, of a bill of exchange, drawn by Mousley & Co. upon the said J. Park, for the sum of 300l., and accepted by the said J. Park, and which said bill became due and payable, according to the tenor and effect thereof, after the said J. Park had become bankrupt, and which credit so given by the defendant to the said J. Park as aforesaid was a credit of a nature likely to end in a debt from the said J. Park to the defendant, and the amount of the said acceptance was, at the time of the commencement of this suit, and still is, due to the defendant, and, together with interest thereon, equals the plaintiff's claim, to which this plea is pleaded: and the defendant further says that, before he had notice that the said J. Park had become bankrupt, and before any sequestration of the estate and effects of the said J. Park, the said J. Park gave credit to the defendant by consigning goods to him for sale for the said J. Park, and upon the terms that the proceeds should be remitted and paid to the said J. Park in Scotland: and that the money *sought to be [*786 recovered by the plaintiff in the said sixth and seventh counts of the declaration, and as to which this plea is pleaded, is the proceeds of and money arising from the sale of the said goods under and according to the terms of the said consignment, and which said consignment was of a nature or likely to end in a debt from the defendant to the said J. Park: and the defendant says that he is ready and willing, and hereby offers, to set off the amount so due to him, the defendant, as endorsee and holder of the said bill of exchange as aforesaid, against the claim of the plaintiff in respect of the matter herein pleaded to, and that, by the law of Scotland, he is entitled so to do; and such set-off forms an answer to so much of the plaintiff's claim as this plea is pleaded to."

Demurrer, and joinder in demurrer.

Dr. *Phillimore* (*Aspland* with him), in support of the demurrer.—The plea proceeds on the assumption that the Scotch law is applicable to the present case; and that, by that law, the defendant is entitled to

set off a cross claim against that portion of the declaration to which it is pleaded.

Set-off is matter of procedure, and, as such, must be determined by the *lex fori*, which in this case is the English law. The point has not, indeed, been expressly decided in England, but many authorities recognise the law to be so. In *Don v. Lippman*, 5 Cl. & F. 1, Lord Brougham, p. 20, says: "The law of the country where the contract is to be enforced, must prevail in enforcing such contract, though it is conceded that the *lex loci contractus* may be referred to for the purpose of expounding it. If, therefore, the contract is made in one country to be performed in a second, and is enforced in a third, the law of the last alone, and not of the other two, will govern the case." In *Leroux v. Brown*, 12 C. B. 801 (E. C. L. R. vol. 74), it was held that an action will not lie in this country to enforce an oral agreement made in a foreign country, though valid there, which, if made here, could not have been sued on by reason of the Statute of Frauds.

There are, however, several foreign authorities on this point. In Story's Conflict of Laws, § 575, 5th ed.: "The admissibility of the set-off is to be governed entirely by the *lex fori*, and not by the *lex loci contractus*;" for which he cites *The Bank of Galliopolis v. Trimble*, 6 B. Monroe 599 (Appeal Cases in Kentucky), in which the Court say, at p. 601:—"Set-off is a mode of defence, essentially, not a part, connected with the remedy, which according to the well settled and universal doctrine is governed by the law of the *forum*, and not by the *lex loci contractus*. The forms of remedies, the modes of proceeding and the execution of judgments, are to be regulated solely and exclusively by the laws of the place where the action is instituted." In 2 Kent Com., § 458, 7th ed.:—"Parties are presumed to contract in reference to the laws of the country in which the contract is made, and where it is to be paid, unless otherwise expressed; the maxim is, that *locus contractus regit actum*, unless the intention of the parties to the contract be clearly shown. The rule stated in Huber relative to contracts made in one country, and put in suit in the Courts of another, is the true rule, and one which the Courts follow, viz. the interpretation of *the contract is to be governed by the law of the country where the contract was made; but the mode of suing and the time of suing, must be governed by the law of the country where the action is brought." [He also cited *Gibbs v. Howard*, 2 New Hampshire Rep. 296.]

In *Green v. Farmer*, 4 Burr. 2214, Lord Mansfield said, p. 2220-1:—"Natural equity says, that cross demands should compensate each other, by deducting the less sum from the greater; and that the difference is the only sum which can be justly due. * * * Where there were mutual debts unconnected, the law said they should not be set off; but each must sue. And Courts of equity followed the same rule, because it was the law: for, had they done otherwise, they would have stopped the course of law, in all cases where there was a mutual demand. The natural sense of mankind was first shocked at this, in the case of bankrupts: and it was provided for by 4 Ann. c. 17, s. 11, and 5 G. 2, c. 30, s. 28." In 2 Poth. on Oblig., by Evans, App. No. 18, p. 112, after citing this case, it is said:—"The doctrine which

was thus introduced into the law of England, partakes very much of the nature of *compensation* in civil law; but there is this material difference, that the debts are not in themselves and of right balanced and extinguished; that the right of *set-off* is merely a defence to an action for the debt." [He also cited *Oulds v. Harrison*, 10 Exch. 572, and *CROMPTON*, J., referred to '*Burrough v. Moss*, 10 B. & C. 558 (E. C. L. R. vol. 21).] [BLACKBURN, J.—The facts disclosed in this plea show a case of mutual credit in bankruptcy, which is a very different thing from a *set-off*, and which existed long before the Statutes of Set-off. In 1 Christ. Bankrupt Law, p. 500, *2d ed., which [*789 contains more information on the history of bankruptcy than any book I know, it is stated that, at the time of 1 Jac. 1, c. 15, the Commissioners only assigned the balance of the debts between the parties. In proof of this, he cites *Anon.*, 1 Mod. 215, and *Chapman v. Derby*, 2 Vern. 117, and says that the 4 & 5 Ann. c. 17, s. 11, first mentions the balance and adjustment of the accounts between the bankrupt and his debtor.] The Scotch bankrupt law is regulated by the 19 & 20 Vict. c. 79, which repeals and re-enacts the 2 & 3 Vict. c. 41, both of which are Imperial statutes, and neither contains any provision equivalent to the mutual credit clauses of the English Bankrupt Act. [COCKBURN, C. J.—Is not this a case of mutual credit according to the English law as well as the Scotch? If so, the defence is good, although the Scotch law has been unnecessarily brought into the plea, and the allegation of it may therefore be rejected as surplusage.] The English law might have been a defence if so pleaded, but the defendant has elected to rely on the Scotch law. Besides, this matter is pleaded as a *set-off*, not as a discharge by way of mutual credit. [WIGHTMAN, J.—That is an informal mode of stating the same matter. I feel, however, a difficulty about one thing, namely, that to constitute mutual credit within the bankrupt laws, the credit must have been with the bankrupt; here it was after the bankruptcy.] (He was then stopped.)

F. M. White, contrà.—Admitting the principle that the mode of remedy is to be determined by the *lex fori*, it is very doubtful if *set-off* can be looked on as a mere *mode of remedy. In the [*790 passage which has been cited from Story's *Confl. Laws*, § 575, 5th ed., the author having given as his authority *The Bank of Galliopolis v. Trimble*, 6 B. Monroe 601 (Kentucky Reports), adds, "But see *Bliss v. Houghton*, 13 New Hampshire R. 123, and *Harrison v. Edwards*, 12 Vermont R. 648," both of which seem in conflict with the former case. In *Harrison v. Edwards*, 12 Vermont R. 648, the Court say, "It is a well settled rule, in regard to the construction of contracts, that their *validity* and *extension*, as well as *performance* or *release*, must be determined by the law of the place of contract. These incidents are to be determined by that law, for the reason that the parties are presumed to have contracted with reference to that law only, and, to determine these matters by the law of any other place, would be to contravene the probable intention of the parties. . . . It is true, indeed, that the mode of trial, by which is meant the form of pleading, the quality and degree of evidence, and the mode of redress, must always be determined by the law of the place of trial. No *forum*, in which a remedy is given to foreigners, or upon foreign contracts, is expected to adopt

the forms of trial of the foreign country. Hence, in the present case, the mode of pleading or proving this payment, or set-off, must be determined by our law *now in force*, and not the law in force at the time the transactions happened; but the effect of the defences in precluding a recovery, whether as a payment or offset, must be determined by the *lex loci contractus*." *Lodge v. Phelps*, 1 Johns. Cases 139 (New York Reports), *Ory v. Winter*, 4 Martin, N. S. 277 (Louisiana Reports), show that matter of substantive defence, such as *791] *payment, Kames on Equity, lib. 3, c. 8, belong to the *lex loci contractus*; and a set-off is treated as payment by Pothier, Obl. part 3, ch. 4, § 590. *Allen v. Kemble*, 6 Mo. P. C. C. 314, shows that such a set-off as this is to be looked on as part of the matter which the parties must be supposed to have had in contemplation at the time of the contract. In *Williams*, app., v. *Wheeler*, resp., 8 C. B. N. S. 299, 311, 314, 316 (E. C. L. R. vol. 98), *Erle*, C. J., and *Willes*, J., throw doubt on *Leroux v. Brown*, 12 Com. B. 801 (E. C. L. R. vol. 74). [BLACKBURN, J., referred to *Rosc. Civil Evid.* 757, 10th ed.]

The plea shows matter which constitutes a defence by the Scotch law, and, if so, it is a defence here, although, as the money was not received previous to the bankruptcy, it would not be a defence within the English law of mutual credit: 12 & 13 Vict. c. 106, s. 171.

Dr. *Phillimore*, in reply.—Payment is a matter *ex post facto*, and therefore cannot depend on the *lex loci contractus*. In Bell's Principles of the Law of Scotland, ch. 20, p. 228, 5th ed., set-off is treated throughout as "compensation." In the passage from Pothier relied on by the other side, he is speaking of the civil law, which, although the Scotch law has adopted, it is with considerable limitation. *Allen v. Kemble*, 6 Mo. P. C. C. 314, was decided on the principle that the successive endorsers of a bill of exchange are liable on it, according to the law of the place of the endorsement, each endorsement being in fact a new drawing; and that case is so treated in Story's Conflict of Laws, § 314, 5th ed., note (4).

COCKBURN, C. J.—Our judgment must be for the defendant.

*I assume, for the present purpose, that Dr. *Phillimore* is right in his contention that set-off is mere matter of procedure; —not of substance of the contract between the parties; and, consequently, must be governed by the *lex fori*. I do not know that it is necessary to decide this point on the present occasion, and certainly something may be said on both sides; but on the whole I incline to that opinion. For although, as matter of equity and justice, if a man owes another 100*l.* and the defendant has a counter claim of 50*l.* the balance is all that the creditor can fairly ask for, yet I cannot say that that state of things is to be considered as part of the original obligation incurred by the debtor. He has his remedy by action to recover the amount of his own claim, and it is only by the intervention of the law that he acquires a different one by treating the claim and counter claim as forming, together, one thing.

I think, however, that it is unnecessary to enter further into this question; for my view of this case is determined by what, I think, is the effect of the plea with reference to Scotch law, namely, that, by that law, a plaintiff is only entitled to recover the balance due from his debtor. Even supposing the effect of the plea were different, one is

shocked at the idea that the debtor who, under a Scotch bankruptcy, is entitled, by Scotch law, to have the amount of his demand allowed against the creditor by way of set-off, should, because he is sued in an English Court of justice, be refused what is his undoubted right in a Scotch Court. But, on more deliberate consideration of the matter, it appears that such a set-off is a creation of statute law, while our statute law only applies to English bankruptcies, and not to those in Scotland; and *perhaps it would be going too far to say that, by the equity of the English statutes, our rules would apply to give the remedy allowed by our law. I am glad to think, however, that there is no insuperable obstacle to the defendant's setting up this cross claim. I think the effect of the plea must be taken to be that, there having been mutual credits between the defendant and the bankrupt, by the law of Scotland (whether by its statute or common law or both combined it is unnecessary to consider), the trustee of the estate and effects of the bankrupt is only entitled to claim, at the hands of any debtor of his estate, the amount of the balance due after credit given. It is true the pleader has adopted the form of the English plea of set-off and mutual credit; but we must take the plea as substantially amounting to this;—here are mutual credits, the effect of which, by the Scotch law, is the discharge of the debtor from all excepting the balance.

WIGHTMAN, J.—The present question is quite independent of the English bankrupt law. The plaintiff sues in England, as trustee of the estate and effects of the bankrupt in Scotland, under the bankrupt law of that country. Now, what is he entitled to claim? That appears by the plea, which alleges what the law of Scotland is; and that is an allegation which might be traversed. Taking the law, then, to be as set out in the plea, it is that the same rule is applicable to Scotch cases as to English ones, i. e., that where there is mutual credit between a bankrupt and the person who sues him, which has ended in a debt, the trustee, in effect, is only entitled to recover the balance.

*BLACKBURN, J.—The question is, what must we construe the averment at the end of this plea to mean? The plaintiff sues as trustee of a trader in Scotland, who became bankrupt; and the question, what passed under the transfer of the bankrupt's goods and chattels to the trustee must be settled by the Scotch law, which must be averred on the pleadings, and proved at the trial. I agree with my Lord Chief Justice and my brother Wightman that, when we have this plea setting out what are called mutual credits, showing matters which have resulted in this debt, we must see the effect of the Scotch transfer. And I cannot read the averment at the end of the plea otherwise than as averring that the transfer of the property of the bankrupt, under such circumstances, came to the trustee with a right to deduct cross claims;—in other words, that the transfer in the Scotch law is a transfer of the balance of account after allowing for mutual credits. Whether that is the Scotch law I cannot say. Considering that the Scotch Bankrupt Act passed after many attempts to make the Scotch and English bankrupt law the same, I think it probable that the Legislature meant to make it so; but I give no opinion on the point. The Scotch law is, in my opinion averred in fact in this plea, though perhaps the Exchequer Chamber may hold otherwise.

My brother Crompton before leaving the Court, desired me to say that he agrees with its other members in their judgment.
Judgment for the defendant.

*795] *The QUEEN v. GEORGE WILLIAM ACASON. June 11.

6 & 7 W. 4, c. 86, s. 7.—*Superintendent Registrar.—Clerk to board of guardians.*

1. Under stat. 6 & 7 W. 4, c. 86, s. 7, the clerk to the board of guardians of a union created under stat. 4 & 5 W. 4, c. 76, has no right to be Superintendent Registrar except in the case of the first appointment after stat. 6 & 7 W. 4, c. 86, coming into operation; and on any subsequent vacancy the power of appointment is in the board of guardians.

2. W. A., who was clerk to the board of guardians of a union, created under stat. 4 & 5 W. 4, c. 76, and was also Superintendent Registrar appointed by the Registrar General, under stat. 7 W. 4 & 1 Vict. c. 22, died on January 4th, 1861. On the 17th January, the defendant was appointed Superintendent Registrar by the board of guardians. On the 14th February, the relator was appointed clerk to the board of guardians. Upon information in the nature of quo warranto, Held, that the defendant was duly appointed Superintendent Registrar.

INFORMATION in the nature of a quo warranto against George William Acason, at the relation of Stanley Harris, alleged that the Barnet Union was a union of divers parishes in the counties of Hertford and Middlesex, duly created and established under the provisions of stat. 4 & 5 W. 4, c. 76; that within the said union, pursuant to the provisions of stat. 6 & 7 W. 4, c. 86, there of right ought to be one Superintendent Registrar; and the clerk to the board of guardians of the said union, if he should think fit to accept such office, and have such qualifications in that behalf as the Registrar-General of births, deaths, and marriages in England might, by any general rule, declare to be necessary, ought of right, pursuant to the provisions of the last-mentioned Act, to be the Superintendent Registrar of such union; that the place and office of Superintendent Registrar of the *796] said union was a public place and office of great trust and pre-eminence within the said union touching the registration of births, deaths, and marriages within the same; that William Acason, deceased, who died on or about the 4th January, 1861, was, at the time of his death, the duly and legally appointed clerk to the board of guardians of the said union, and also the Superintendent Registrar thereof; that Stanley Harris was, on the 14th February, in the year last aforesaid, duly elected to be, and still is, the clerk to the board of guardians of the said union; that Stanley Harris, immediately upon his election to be such clerk, thought fit to accept the office of Superintendent Registrar of such union, and gave notice of such his intention to the board of guardians; that during all the times aforesaid he was, and still is, possessed of the requisite qualifications to be such Superintendent Registrar as the Registrar-General had, by general rules in that behalf, declared to be necessary. The information then proceeded to allege that the defendant, on the 15th February, 1861, usurped the office.

Plea. That, on the 30th June, 1845, William Acason was, pursuant to the provisions of stat. 7 W. 4 & 1 Vict. c. 22, duly appointed by George Graham, Esq., the then Registrar-General of births, deaths, and marriages in England, to be the Superintendent Registrar for the

district of the Barnet Union; and that, at the time of that appointment, the office of Superintendent Registrar of births, deaths, and marriages for the said district had been vacant for more than fourteen days; and that William Acason was not, at the time of his appointment, and until long after, that is to say, in April, 1847, appointed clerk to the board of guardians of the said union; and at the [*797] time of his death he held the office of Superintendent Registrar by virtue of the appointment by George Graham, Esq., and not by virtue of his office of clerk to the board of guardians: that, at a meeting of the board of guardians of the said union, held on the 17th January, 1861, the defendant was duly appointed by the board of guardians to be the Superintendent Registrar of the said union, and three and more of the guardians were present at the meeting, and concurred in the appointment of the defendant; and the defendant, at the time of his appointment, was, and still is, possessed of all the qualifications which the Registrar-General of births, deaths, and marriages in England has, by general orders in that behalf, declared to be necessary for the said office; and was, in all respects, duly qualified to be appointed to the said office; and, at the time of his appointment, the office of clerk to the board of guardians of the said union was vacant, and Stanley Harris was not elected to be clerk to the board of guardians until after the appointment of the defendant, that is to say, on the 14th February, 1861. The plea then alleged that the defendant, by virtue of that appointment, claimed to be Superintendent Registrar of the union.

Replication. That the defendant was not only appointed by the board of guardians to be the Superintendent Registrar of the said union, because, from the time of the death of William Acason down to and inclusive of the time of the supposed appointment of the defendant to be Superintendent Registrar, and thenceforth, and until the election of Stanley Harris to be the clerk to the board of guardians, there was not any person appointed or elected to be clerk to the board of *guardians, and Stanley Harris was duly elected to [*798] be such clerk in the place and stead of William Acason, deceased. Verification.

Demurrer, and joinder therein.

Lush (Bulwer with him), for the defendant.—The question is, whether the clerk to the board of guardians of a union has a right to displace the Superintendent Registrar who has been appointed by the board of guardians upon a vacancy which occurred before his own appointment. The office of clerk to boards of guardians was first constituted under stat. 4 & 5 W. 4, c. 76, s. 46. The question as to the appointment of the Superintendent Registrar depends upon stat. 6 & 7 W. 4, c. 86, s. 7. The full operation of that Act was suspended until the 1st of July in the following year, 1837, by stat. 7 W. 4 & 1 Vict. c. 1; and it was amended and explained by stat. 7 W. 4 & 1 Vict. c. 22, which was passed on the 30th June in that year.

By stat. 6 & 7 W. 4, c. 86, s. 7, the guardians of every union, parish, and place are to divide the same into Registrars' Districts, subject to the approval of the Registrar-General; and "shall appoint a person, with such qualifications as the Registrar-General may by any general rule declare to be necessary, to be registrar of births and

deaths within each district, and in every case of vacancy in the office of registrar shall forthwith fill up the vacancy; and the clerk to the guardians of every such union, parish, or place, shall, if he shall think fit to accept such office, and have such qualifications as the Registrar-General may by any general rule declare to be necessary, be the Superintendent Registrar thereof; and *in the event of his refusal or disqualification to act in that capacity, the guardians shall appoint a person, with such qualifications as the Registrar-General may by any general rule declare to be necessary, to be the Superintendent Registrar of each union or of such parish or place, and in every case of vacancy of the office of Superintendent Registrar shall forthwith fill up the vacancy; and every Registrar and Superintendent Registrar shall hold his office during the pleasure of the Registrar-General." The effect of this enactment is that in the first instance a Superintendent Registrar is not to be appointed if the clerk to the guardians is willing to accept the office and is qualified; in the event of his being unwilling or disqualified, the guardians are to appoint; and then the contingency of future vacancies is provided for and the power of appointment is given to the guardians. If it had been intended that the clerk to the board of guardians should always have a right to the office, the words "from time to time" would have been introduced; and, if such were the construction, there never would be a vacancy in the office of Superintendent Registrar, unless the clerk to the board of guardians refused to accept the office or was disqualified; so that the Superintendent Registrar, instead of holding his office during the pleasure of the Registrar-General, would hold it at the will of the clerk of the board of guardians. By the Amending Act, 7 W. 4 & 1 Vict. c. 22, s. 14, "in every case in which the clerk to any such board of guardians shall not think fit or shall be disqualified to accept the office of Superintendent Registrar, and the guardians shall refuse or neglect during fourteen days after being required so to do by the Registrar-General to appoint a Superintendent Registrar properly qualified, and in every case of vacancy of the *office of Registrar or Superintendent Registrar in any such union, parish, or place in which the guardians shall refuse or neglect during fourteen days after such vacancy to appoint a Registrar or Superintendent Registrar properly qualified, the appointment shall lapse to the Registrar-General." This enactment is to be read with stat. 6 & 7 W. 4, c. 86, s. 7, which had not then come into operation. Suppose the clerk to the board of guardians elects to take the office of Superintendent Registrar on its first creation, and then dies; the board of guardians are not bound to appoint a clerk within any specified time; but if they neglect to fill up the office of Superintendent Registrar within 14 days, the Registrar-General would appoint. Could the person appointed upon their default by the Registrar-General be displaced by the clerk to the guardians?

Further, if the clerk to the guardians has a right to the office on any future vacancy, that right can only exist when the office becomes vacant after he himself has been appointed. He cannot displace a person appointed by the board of guardians.

Huddleston (Philbrick with him), for the relator.— Looking to the duties assigned by stat. 6 & 7 W. 4, c. 86, to the two offices of clerk

to the board of guardians and Superintendent Registrar, it would be most convenient that they should be held by the same person. [He referred to stat. 7 W. 4 & 1 Vict. c. 22, s. 24.] Also, sect. 7 of stat. 6 & 7 W. 4, c. 86, draws a distinction between the appointments of Registrar and Superintendent Registrar,—the appointment of the former is to be by the board of guardians, but of the latter by the board of guardians only in the event of their clerk *refusing to [^{*801} take the office or being disqualified; and the clause which follows is to be read as if it were “in every case of *such* vacancy of the office of Superintendent Registrar shall forthwith fill up the vacancy.” If it had been intended to limit the right of the clerk to the board of guardians in the manner contended for, the words would have been “in every case of vacancy after the first.”] [WIGHTMAN, J.—Stat. 7 W. 4 & 1 Vict. c. 22, s. 14, requires the guardians to appoint within fourteen days: suppose there is no clerk to the board of guardians when a vacancy occurs in the office of Superintendent Registrar.] In that case the guardians cannot fill up the vacancy until they have appointed their clerk, for although no time is specified within which a vacancy in the latter office must be filled up, a reasonable time must be intended. Stat. 7 W. 4 & 1 Vict. c. 22, s. 17, shows that the option of the clerk to the board of guardians to take the office of Superintendent Registrar is not confined to the first appointment: it enacts “that whenever there are two or more clerks to the guardians of any union, parish, or place,” one only of whom shall possess the necessary qualifications, or one only of whom shall think fit to accept the office, “such one shall be the Superintendent Registrar;” and if two or more of such clerks shall possess the necessary qualifications, and be willing to accept such office, then such guardians shall elect one of such clerks to be the Superintendent Registrar; “and that no other person shall be or be elected or appointed to be Superintendent Registrar of any such union, parish, or place, unless all the clerks to the board of guardians (possessing such qualifications as aforesaid) shall not think fit to accept such office.” [BLACKBURN, J.—I do not see why that section is not confined to the first appointment: [^{*802} it does not say “whenever there is a vacancy.”] CROMPTON, J. —“Whenever” is the same as “in every case when,” and may refer to the first time of appointing. BLACKBURN, J.—“In cases in which” would be better grammar, but the sense is the same.] The words “shall be elected or appointed” are prospective, and cannot apply to the first appointment under the Act. [CROMPTON, J.—The language of the enactment must be prospective, because nothing had been yet done. There were many districts formed under stat. 6 & 7 W. 4, c. 86, s. 10, which included parishes not then formed into unions, and for these the Registrar-General appointed Registrars and Superintendent Registrars: but, by sect. 11, when a board of guardians was established for any parish forming part of that temporary district, and as soon as a registrar was appointed, and the clerk of the guardians accepted the office of Superintendent Registrar, or the guardians appointed a Superintendent Registrar, the parish ceased to be part of the temporary district, and the Registrar and Superintendent Registrar ceased to hold their offices, unless reappointed. WIGHTMAN, J.—If the clerk to the board of guardians were always to have the office

of Superintendent Registrar if he pleased, what necessity was there for the words, in sect. 7, "in every case of vacancy of the office of Superintendent Registrar shall forthwith fill up the vacancy?"] They are the same words as are used as to filling up the vacancies in the office of registrar. [CROMPTON, J.—They must mean the same in the case of the Superintendent Registrar as in the case of the Registrar. WIGHTMAN, J.—Stat. 7 W. 4 & 1 Vict. c. 22, s. 16, enables the Superintendent Registrar to appoint a deputy, and provides that *803] *he, "in case of the death of the Superintendent Registrar, shall act as Superintendent Registrar until another be appointed." This shows that, after the first, there is to be an appointment. CROMPTON, J.—Suppose the guardians, having neglected to appoint for fourteen days after a vacancy, the Registrar-General appointed, and then the guardians elected a clerk, could he displace the Superintendent Registrar appointed by the Registrar-General?] The Superintendent Registrar is to hold during the pleasure of the Registrar-General, and therefore could not be displaced. [WIGHTMAN, J.—Suppose the clerk to the board of guardians is willing to accept the office: can he be in the office without an appointment? And suppose the guardians will not appoint him within fourteen days, the appointment lapses to the Registrar-General, and he may appoint whom he will.]

Lush was not called upon to reply.

WIGHTMAN, J.—I am of opinion that the provision in stat. 6 & 7 W. 4, c. 86, s. 7, that the clerk to the guardians shall be the Superintendent Registrar, must be limited to the first filling of the office after the coming of the Act into operation; and that, in the case of a vacancy occurring afterwards, the Superintendent Registrar is to be appointed by the guardians. The purview of the Act warrants this construction; and, looking at the section itself, there is first a provision that the guardians shall appoint the registrar, "and, in every case of vacancy in the office of registrar shall forthwith fill up the vacancy:" it is agreed that the term "fill up" means "appoint." Then comes the provision as to the Superintendent Registrar:—"the clerk *804] to the guardians of every *such union, parish, or place shall, if he shall think fit to accept such office, and have such qualifications as the Registrar-General may by any general rule declare to be necessary, be the Superintendent Registrar thereof," that is, the clerk of the guardians, at the time when the Act comes into operation, shall be Superintendent Registrar *virtute officii*: "and in the event of his refusal or disqualification to act in that capacity, the guardians shall appoint." I understand this as applying to the first appointment after the Act comes into operation, and not to all future cases of vacancy: those are provided for by the next clause, which is prospective,—"and in every case of vacancy of the office of Superintendent Registrar" the guardians "shall forthwith fill up the vacancy." Mr. Huddleston says that the words "in case the clerk shall not think fit to accept the office, or shall not have the required qualifications," are to be superadded; but I think that cannot be done.

Stat. 7 W. 4 & 1 Vict. c. 22, s. 14, which is to be read with the former statute, confirms this view: it enacts, "that in every case

in which the clerk to any such board of guardians shall not think fit or shall be disqualified to accept the office of Superintendent Registrar, and the guardians shall refuse or neglect, during fourteen days after being required so to do by the Registrar-General to appoint a Superintendent Registrar properly qualified:"—this had reference to the first appointment, because none could take place until this Act came into operation, the former Act having been suspended, so as to come into operation at the same time as this:—"and in every case of vacancy of the office of Registrar or Superintendent Registrar . . . in which the guardians shall refuse or neglect during fourteen days after *such vacancy to appoint a Registrar or Superintendent [*805 Registrar properly qualified"—this applies to future vacancies: in all the above cases "the appointment shall lapse to the Registrar-General;" so that, in case of a vacancy in the office of Superintendent Registrar after the first appointment, if the guardians refuse to appoint the right of appointment lapses to the Registrar-General, and he may appoint whom he will, without respect to the claim of the clerk. Then, if the office devolved upon the new clerk to the guardians whenever a vacancy occurred in that office, the appointment of Superintendent Registrar by the Registrar-General must be temporary, which would be inconsistent with the terms of sect. 14. Other sections fortify this construction of stat. 6 & 7 W. 4, c. 86, s. 7. The object of the Legislature was to provide for the first appointment to the office, and in case of future vacancies to vest the appointment in the guardians.

CROMPTON, J.—I take the same view of stat. 6 & 7 W. 4, c. 86, s. 7, as my brother Wightman has expressed in his judgment. Mr. Huddleston wishes to introduce the word "such" in the clause providing for vacancies in the office of Superintendent Registrar. But I do not see why the Legislature should have limited the right of the guardians to appoint only in the two cases where their clerk was either unwilling or disqualified to hold the office. It is a common mode of legislating in similar modern Acts to direct who shall in the first instance fill the offices created, and to provide differently for subsequent vacancies by conferring a power of appointment. There are such provisions as to officers in Municipal Corporations in stat. 5 & 6 W. 4, c. 76. And *that is the course adopted in this Act. It is a [*806 strong argument that, by sect. 7, the office is to be held during the pleasure of the Registrar-General; whereas, if the construction contended for by Mr. Huddleston were right, viz., that as soon as a new clerk is appointed there is *ipso facto* a vacancy in the office of Superintendent Registrar, a man who was well appointed to that office would be put out without the concurrence of the Registrar-General.

Suppose that, at the time of the first appointment or institution of the office, the clerk to the guardians refused to accept it, and A. B. was appointed, and was well in the office, and afterwards the clerk died, and a new clerk was appointed, he could not be Superintendent Registrar without displacing A. B. Therefore it cannot be that the new clerk is *ipso facto* Superintendent Registrar. And all the provisions in stat. 7 W. 4 & 1 Vict. c. 22, which was passed to supply the

defects found out in the former Act, fit intelligibly into this construction.

As the duties of the clerk to the guardians and of the Superintendent Registrar are to some extent, though not in all respects, analogous, it is convenient that he should be appointed by the guardians.

It was natural to provide that the clerk should, if he chose, be the first Superintendent Registrar; and the words "in every case of vacancy" were used designedly to give the appointment afterwards to the guardians.

BLACKBURN, J., concurred.

Judgment for the defendant.

*807] *GLOVER, Appellant, BOOTH, Respondent. June 12.

20 & 21 Vict. c. 43, s. 3.—Appeal.—Costs.

On an appeal from justices under stat. 20 & 21 Vict. c. 43, the case was sent back to be re-stated, and ultimately judgment was given for the appellant with costs. On the taxation, the Master allowed to the appellant the costs of preparing the case beyond the fees allowed to the clerk of the justices by sect. 3 and schedule (A.), and also the costs of amending the case. Held, that the taxation was right.

RULE calling upon the appellant to show cause why the Master should not be at liberty to review his taxation of costs in this case.

Upon the hearing of an information, under stat. 7 & 8 G. 4, c. 30, s. 24, before certain justices of the West Riding of Yorkshire, in petty sessions, against the appellant for wilful and malicious damage to the grass in a close of the respondent, by driving a cart over it, the appellant claimed a right of way over the locus in quo to a close in his occupation. The close of the respondent, and that in the occupation of the appellant, which adjoined each other, had been devised by James Booth, the father of the respondent, the former to the respondent and the latter to another son, under whom the appellant occupied. In neither case did the devise make any reference to a right of way. The justices convicted the appellant, and fined him 1s. and costs; but, upon his application, in January, 1861, a case for the opinion of the Court was stated under stat. 20 & 21 Vict. c. 43, s. 2.

The case came on for argument in Easter Term 1861, when, upon the application of the appellant, it was sent back for amendment under sect. 7. On the 21st of *May it was returned, with the terms of the devise set out more fully; but the justices stated that they had no other materials before them beyond those set out in the original case.

The amended case came on for argument in last Hilary Term, when an order was made reversing the conviction with costs.

The Master, by his allocatur, allowed costs amounting to 4*l*. 12*s.* 10*d.*; which included the following items: "Instruction to settle draft case" and "Perusing case as drawn by Mr. M. (the magistrates' clerk)," "Making copy of case," and also the costs of the appellant's application to send back the case to the magistrates for amendment.

Maule showed cause.—First. The Master was right in allowing the costs of settling the case. By stat. 20 & 21 Vict. c. 43, s. 6, the Court may make such order as to costs as to it may seem fit; and the Mas-

ter, as the officer of the Court, has followed the practice which has existed since the passing of the statute. Sect. 3 only relates to the fees to which the clerk to the justices is entitled: they are to be according to Schedule (A) until they are otherwise regulated under stat. 11 & 12 Vict. c. 43, s. 30, which has not been done. Schedule (A) is headed "Fees to be taken by clerks to justices;" and has reference only to the fees payable to such clerk when the case is drawn and settled by him. The other items are not regulated by and are not within the contemplation of this statute. [WIGHTMAN, J.—The charges in dispute are incidental to the employment of an attorney. BLACKBURN, J.—According to this taxation the defeated party may be called upon to pay the costs which the other *side has incurred in employing an expensive attorney. CROMPTON, J.— [*809 Certainly it was not the intention of the Legislature that such bills of costs as this should be incurred.]

The Court then called upon

West, in support of the rule.—Stat. 20 & 21 Vict. c. 43, s. 6, gives the Court power to make an order for costs in each particular case. [CROMPTON, J.—The Court may direct that they shall be regulated according to a particular scale.]

As to the costs of settling the case, the taxation by the Master is contrary to sect. 3, which intends that the case should be drawn by the clerk to the justices. It says that the appellant, "before a case shall be stated and delivered to him by the justice or justices," shall enter into a recognisance; and shall, "before he shall be entitled to have the case delivered to him, pay to the clerk to the said justice or justices his fees for and in respect of the case and recognisances, and any other fees to which such clerk shall be entitled, which fees, except such as are already provided for by law, shall be according to the schedule to this Act annexed marked (A), until the same shall be ascertained, appointed, and regulated" in the manner prescribed by stat. 11 & 12 Vict. c. 43. According to the schedule, the only fee in respect of the case is "for drawing case and copy," whereas the Master has allowed items relating to the settling of the case by the attorney for the appellant. If the appellant interferes in preparing the case, he should pay the extra costs occasioned thereby.

Also the costs of restating the case ought not to be charged to the respondent: the defect sought to be *amended was a nonfeasance on the part of the magistrates by whose clerk the case was drawn and not on the part of the respondent; and, further, the case was returned without any alteration by the magistrates. [*810]

WIGHTMAN, J.—The fees specified in Schedule (A) to stat. 20 & 21 Vict. c. 43, including that for drawing the case, are to be taken by the clerk to the justices. The other costs besides those so specified follow the ordinary course of costs in a suit at law. In the present case the amount of the costs allowed seems exceedingly high; but the matter was of importance to the parties and of some difficulty; and the case required to be stated with accuracy.

CROMPTON, J.—There does not appear to have been anything wrong in the conduct of the appellant. I think, however, it is desirable that there should be some regulation as to the allowance of costs of an appeal from the summary jurisdiction of justices; because a high

scale of taxation tempts parties to appeal in unimportant cases. Still the appellant should be allowed all the fair costs of prosecuting an appeal under this statute and bringing his case before the Court, as he is upon appeal from the Quarter Sessions.

BLACKBURN, J.—It might not be a bad regulation that the costs of settling a case should not be charged to the respondent; but such is not the present practice. The other costs may have been necessary for the prosecution of the appeal.

Rule discharged, without costs.

*811] *The QUEEN v. The Justices of The WEST RIDING of YORKSHIRE and WILLIAM HENRY RIPLEY.

June 12.

5 & 6 W. 4, c. 30, s. 90.—*Certificate.—Appeal.—Abandonment.—Costs.*

After notice and grounds of appeal against a certificate of justices for the diversion of a highway, the person at whose instance the certificate was given gave notice that he abandoned further proceedings, and should not apply to the Quarter Sessions for the enrolment of the certificate. The appeal was entered, and, being called on and no one appearing, was struck out. Afterwards on the same day the appellant applied for costs under stat. 5 & 6 W. 4, c. 50, s. 90, by which the Quarter Sessions are authorized and required to award to the party giving or receiving notice of appeal such costs and expenses as shall be incurred in prosecuting or resisting such appeal, whether the same shall be tried or not: Held, that the Quarter Sessions were bound to make an order for the costs.

IN Easter Term, T. Campbell Foster obtained a rule calling upon the justices of the West Riding of the county of York, and William Henry Ripley, to show cause why a writ of mandamus should not issue, commanding them to enter continuances to the next Quarter Sessions for the said Riding upon the appeal of Joseph Pearson against a certificate of two justices, dated the 31st October, 1861, for diverting a highway leading from within the township of Wyke, and at such Quarter Sessions to make such order for costs in the matter of the said appeal as is required by law, the proposed diversion of the said highway having been abandoned after notice of appeal had been given and the grounds of appeal had been delivered.

On the 31st October, 1861, two justices of the West Riding of Yorkshire, having viewed the highway in question, and having had the necessary proof and plan laid before them, signed a certificate for diverting the same, which, together with the other documents, was on the 2d November, lodged with the clerk of the peace, in pursuance of stat. 5 & 6 W. 4, c. 50, s. 85. On the 14th, Joseph Pearson, being a person deeming himself aggrieved, gave notice to the surveyor of the highways of his intention to appeal against the certificate, together with a statement of the grounds of appeal under sect. 88. On the 20th, notice was given by William Henry Ripley the person at whose instance the certificate was given, that he abandoned further proceedings, and that no application would be made to the Quarter Sessions for the purpose of having the certificate enrolled. At the Quarter Sessions held on the 31st December the appeal was entered and placed on the list, and upon being called

*812] the necessary proof and plan laid before them, signed a certificate for diverting the same, which, together with the other documents,

on in its turn and no one appearing it was struck out. Afterwards, on the same day, the counsel for the appellant who had been instructed to move to quash the certificate with costs applied to the Court to reinstate the appeal and, in pursuance of sect. 90, make an order for costs; which application was refused.

Maule showed cause.—The Quarter Sessions were not bound to restore the appeal; and the appeal must be before the Court in order to enable them to give costs under stat. 5 & 6 W. 4, c. 50, s. 90. [CROMPTON, J.—By that section the Quarter Sessions are "authorized and required to award to the party giving or receiving notice of appeal such costs and expenses as shall be incurred in prosecuting or resisting such appeal, whether the same shall be tried or not." The right to apply for costs does not arise until it is ascertained whether the appeal will *be tried or not. Is not this a case in which, [*813 the appeal not being tried, the party is entitled to the costs of preparing to resist the certificate?] If an application for costs may be made, though there is no cause before the Sessions, this rule cannot be resisted. [BLACKBURN, J.—Section 90 says that the party giving notice of appeal is entitled to costs. If the argument against the rule were right, it would always be in the power of a party who did not appear at the Quarter Sessions to support the certificate of the justices to deprive the appellant of costs.]

T. Campbell Foster was not called upon to support the rule.

Per CURIAM. (WIGHTMAN, CROMPTON, and BLACKBURN, JJ.)

Rule absolute without costs, the defendants undertaking that an order for costs should be made without a mandamus issuing.

*PATERSON v. HARRIS. June 17.

[*814

Distributive issue.—Costs.

In an action on a policy of insurance in the ordinary form, with the common memorandum, on a share in The Atlantic Telegraph Company, alleging a total loss of the cable by perils of the seas; the defendant pleaded that the subject-matter of the insurance was not, nor was any part thereof, during the continuance of the risk covered by the policy, lost by the perils insured against, or any of them. Issue having been joined on this plea, the plaintiff recovered in respect of a small portion of the cable only, the rest not having been lost by the perils insured against, the damages on the portion recovered exceeding 3*l.* per cent. on the value of the policy. Held that the plea might be taken distributively, and that the verdict should accordingly be entered for the defendant as to all the claim except so far as related to the loss of the portion of the cable on which the plaintiff succeeded.

THE first count of the declaration was on a policy of insurance on a share in The Atlantic Telegraph Company, alleging a total loss of the cable by perils of the seas, whereby the share became of no value. The policy was in the ordinary form, with the common memorandum.

The second count was on a policy similar to the first, with an additional memorandum that it was understood and agreed that the insurance should cover and include the successful working of the cable when laid down.

There was also the common count for money had and received.

Pleas. 1. That the defendant did not promise or become an insurer as alleged.

2. To the first count. That the subject-matter of the insurance was not, nor was any part thereof, during the continuance of the risk covered by the policy, lost by the perils insured against, or any of them.

3. To the second count. That the subject-matter of the insurance was not, nor was any part thereof, during the continuance of the risk covered by the policy and *memorandum, lost by the perils ^{*815]} insured against, or any of them.

4. To the whole declaration, Payment before action brought.

5. To the common count, Never indebted.

Issue on all the pleas.

At the trial of the cause, a verdict was entered for the plaintiff, subject to a question reserved; and the Court having decided that the plaintiff was only entitled to recover with respect to a small portion, namely, 373 miles, of the cable, as the loss of the rest was not caused by perils of the seas, but from the chemical action of the sea on it after immersion, arising from inherent defects in the cable, the following rule was drawn up.

"Upon reading, &c., and upon hearing, &c., it is ordered that the arbitrator appointed by the parties do assess the damages as to the 373 miles of cable upon the principle laid down by the Court; and if he find that the damage so assessed amounts to or exceeds 3*l.* per cent., the verdict is to be entered for the plaintiff, as to such portion of the amount so found as the defendant's subscription bears to the whole sum insured by the policy, and costs 40*s.*; but if such damages amount to less than 3*l.* per cent., then the verdict is to be entered for the defendant."(a)

The arbitrator having assessed the damages at a sum exceeding 3*l.* per cent. on the value of the policy, the following order was made by Blackburn, J.

"Upon hearing counsel on both sides, I do order that, having regard to the finding of the jury and the *judgment of the ^{*816]} Court, the verdict be entered for the defendant upon the issues arising on the first and last counts, and for the plaintiff on the first issue so far as it relates to the second count, and on the third issue generally, with damages according to the finding of the arbitrator; with liberty to apply to the Court."

A rule was obtained by the defendant to vary this order, by directing that the verdict upon the issue arising upon the third plea be entered for the defendant as to all the claim, except so far as related to the loss of 373 miles of the cable.

This rule was argued on the 14th and 17th June, and judgment was given on the latter day.

W. Murray showed cause.—The question is whether the third issue is divisible, so as to entitle the defendant to have the verdict entered for him for the portion on which he has succeeded. The issue is, however, entire; and to hold it otherwise would lead to a multiplicity of issues. The second count on which it arises is a claim for damages in respect of a total loss of the cable the share in which was insured, and the defendant cannot claim to have the issue divided on the ground that the loss turns out to have been only partial. The plain-

(a) See the Report, vol. 1, p. 336.

tiff could not have declared for a partial loss of this portion of the cable until the voyage was at an end, seeing that after a partial loss there may be a total loss, in which of course the former would be included: *Stewart v. Steele*, 5 Scott, N. R. 927, 941, 948-9, per *Maule, J.*; *Blackett v. The Royal Exchange Assurance Company*, 2 Cr. & J. 244, 248, per Lord Lyndhurst.

**Anderson v. Chapman*, 5 M. & W. 483, is an authority for [*817] the plaintiff. That was an action against the defendant as a carrier by sea, charging damage to goods by improper stowage, and otherwise negligently taking care of and conveying them. The plaintiff failed to prove any negligence in respect of stowage, but proved a damage to one cask by negligence in the loading, and it was held that the defendant was not entitled to any part of the costs on the above issue, under Reg. Gen. H. 2 W. 4, r. 74, which directs that "the costs of all issues found for the defendant shall be deducted from the plaintiff's costs;" and Parke, B., referred to *Cox v. Thomason*, 2 C. & J. 498, 1 Dowl. P. C. 572, 2 Tyrw. 411. [CROMPTON, J.—*Traherne v. Gardner*, 8 E. & B. 161 (E. C. L. R. vol. 92), is subsequent to *Anderson v. Chapman*, and seems at variance with it.] That was founded on *Welby v. Brown*, 1 Exch. 770, and was an action on common counts. In an action of indebitatus assumpsit, with several breaches alleged, the defendant may plead to each breach, and an issue may be raised on each. Besides, in the judgment in *Traherne v. Gardner*, no allusion is made to *Anderson v. Chapman*. [CROMPTON, J.—It was, however, brought before the Court in the argument.] Here the declaration states one specific cause of action, as much as if the action were brought for an entire chattel. Suppose two heads of special damage in an action of slander, and the plaintiff failed as to one, would the issue be divisible? [CROMPTON, J.—I do not see why not. BLACKBURN, J., referred to *Biddulph v. Chamberlayne*, 17 Q. B. 351 (E. C. L. R. vol. 79).] If this defendant *can recover the costs he [*818] seeks, then in every action for damages the defendant will be entitled to the costs of all witnesses called by him for the purpose of cutting them down. [He cited *Gray on Costs*, p. 40.]

Honyman, in support of the rule.—The declaration is for a total loss, and under it, the plaintiff may recover *pro tanto* if he proves a partial loss. The test whether an issue is divisible is to see whether the portions supposed to be separate could be made the subject of different breaches. That could not have been so here; at all events, if it could, the plaintiff could have traversed each breach separately. *Anderson v. Chapman*, 5 M. & W. 483, has been virtually overruled by *Traherne v. Gardner*, 8 E. & B. 161 (E. C. L. R. vol. 92), and is inconsistent with *Reynolds v. Harris*, 3 C. B. N. S. 267 (E. C. L. R. vol. 91), and *Freshney v. Wells*, 26 L. J. Exch. 228. [He cited *Goram v. Sweeting*, 2 Saund. 205, and *Gray on Costs*, pp. 61, 64.] [WRIGHTMAN, J.—In Day's Common Law Procedure Acts, p. 68, it is said that not possessed is divisible in trover, but not in an action for mesne profits, for which he cites *Wilkinson v. Kirby*, 15 C. B. 430 (E. C. L. R. vol. 80).]

COCKBURN, C. J.—This rule must be made absolute. I quite agree that where the question between the parties involves simply the amount of damages, and the defendant calls witnesses to cut them

down, the issues raised in reference to the different items that may come under consideration are not taken distributively; but where we can see that the issues raised are distinct, the ends of justice require, and our rules do not prevent, their being so taken.

*819] *Here is an action on a policy of insurance, in which the underwriter undertakes to indemnify the assured for all loss, total or partial, from the perils of the seas; and, according to the established rule, although the declaration is general, it is open to the assured to proceed in respect of either total or partial loss. The declaration being general, the plea has assumed the same shape, and denies the loss in general terms, making no distinction between total and partial loss. It seems to me that, under these circumstances, the subject-matter of the liability is distinct. Even where a partial loss arises before the expiration of the voyage, there is nothing to prevent the assured from maintaining his action for it, although, no doubt, if afterwards there were a total loss, the partial loss would be included in it, and could not be recovered for separately. But here are two distinct grounds of claim, on one contract of indemnity; and, that being so, the plaintiff clearly may recover in respect of the partial loss of part of the cable arising out of one set of circumstances, and for the rest arising out of a different one. It is not alleged that there was anything in common between the two losses, except that both occurred on the ocean, one from a storm, and the other from the chemical action of the sea on the cable after immersion. The question between the parties was whether the loss of that part on which the jury found for the defendant was from the action of the sea, or from inherent defects of the cable. These are two essentially distinct causes of action and grounds of liability; and therefore we ought, if we can, to construe a plea which is an answer to the one part though not to the other, so that the defendant may have his costs of that part on which he succeeded.

*820] *It is true that in *Anderson v. Chapman*, 5 M. & W. 483, a contrary doctrine seems to have been maintained; but the decision of the Court there, on the special circumstances of that case, has been considerably shaken by *Traherne v. Gardner*, 8 E. & B. 161 (E. C. L. R. vol. 92), which is much more like the present.

WIGHTMAN, J.—I am of the same opinion. I was at first a good deal impressed with the argument founded on the extent to which it was said our decision in favour of the defendant might be carried. It was suggested that this was an action to recover unliquidated damages, and that, if we were to decide in favour of the defendant, then, in every case where an action is brought to recover damages, the defendant might claim to be allowed the costs of witnesses produced by him for the mere purpose of cutting them down. But in the present case the record shows that the plaintiff's claim is for a specific sum in respect of a total loss of the cable. No doubt there is a difference between the recovery for a total and for a partial loss; and, although the plaintiff in the declaration went for a total loss, still here are two matters that may be distributed. The case is distinguishable from *Anderson v. Chapman*, 5 M. & W. 483, which was for unliquidated damages. If this were such a case I confess I should have entertained much doubt.

CROMPTON, J.—The effect of the late cases, especially *Traherne v. Gardner*, 8 E. & B. 161 (E. C. L. R. vol. 92), is that where an issue admits of being divided, and there are two really distinct questions before the jury, the postea ought to be made to correspond with the truth by dividing those issues. In old *times, before the [*821 New Rules, questions like the present were of no consequence. Where, for instance, to an action of indebitatus assumpsit, a plea of never indebted was pleaded, and the plaintiff, seeking to recover 25*l.*, recovered only 20*l.*, he had all the costs, because the record was right; and for a long time I was of opinion with Lord Abinger in *Anderson v. Chapman*, 5 M. & W. 483, that the question in such cases was whether anything was due, and in the event of something being found to be due the plaintiff would succeed on the whole issue. But the later cases proceed on a different principle, and I think a right one: for, since the New Rules have made particular pleadings necessary, if the plaintiff claims a large sum, and recovers only part of it, and where the matter will admit of division, I do not see why it should not be divided. Here is an action for a total loss in the ordinary form. Very early in the history of insurance law it was laid down that if the plaintiff declared for a total loss, he might recover for a partial loss; and this because the declaration must be understood to say that the ship had been totally lost, and also that it had been partially lost; and the case was the same as if there had been two counts, when the issue taken on the whole went to every part. According to *Goram v. Sweeting*, 2 Saund. 205, on a declaration for a total loss of ship, tackle, &c., the defendant, in order to traverse the loss successfully, must traverse the loss of every part, which shows that the issue is divisible in its nature. I agree with my brother Wightman that if this were a case of unliquidated damages it [*822 would be otherwise; but the present issue is *clearly divisible, and two distinct questions are raised, not only on the form of the pleadings, but on the actual matter. One was a claim in respect of a total loss of the cable, another in respect of the loss of a portion of the cable on quite a different occasion. In *Traherne v. Gardner*, 8 E. & B. 161 (E. C. L. R. vol. 92), we considered all the items claimed, and having found five or six of them in favour of the defendant, held that, as the issue was capable of being divided, and the questions raised were distinct, we should enter the result according to the truth. If *Anderson v. Chapman*, 5 M. & W. 483, had been a case of liquidated damages with one breach alleged it ought to be taken for law. But since the late cases I entertain some doubt whether it was rightly decided; for Mr. Gray, in his Treatise on the Law of Costs, p. 64, questions if the issue in *Anderson v. Chapman* did not admit of division. Mr. Gray puts it very well thus: "If substantially there were but one breach, the issue would not be distributable; but if the general breach included two or more particular breaches, to each of which a distinct item applied, and the defendant had a distinct case and evidence as to one of those particular breaches, there seems to be no reason why the issue should not be distributable." If the matter is one in respect of which you claim unliquidated damages, it cannot be divided. To illustrate this, suppose a plaintiff were to sue for damages for the non-repair of a dwelling-house to which a hothouse is attached, it would

be absurd to say that he was suing for damages for not repairing each separately. But suppose a storm were to injure some windows in either house, that [would raise a distinct question. Here, not only is the issue divisible, but there were two entirely distinct questions before the jury.

BLACKBURN, J.—There can be no doubt that here, where the plaintiff recovered for one part of the case only, and was defeated on a distinct part (and that the most important), justice (supposing this an isolated case) requires that the defendant should have his costs of the part on which he has succeeded. But the question is to be decided, not on the justice of the particular case, but on the general rules of law. When this matter was before me (acting as deputy for my Lord Chief Justice before whom the case was tried), I came to the conclusion that *Anderson v. Chapman*, 5 M. & W. 483, was precisely in point, and that I ought to follow it. I still entertain the opinion that the principle on which that case went is identical with that involved in the present, but I have changed my opinion as to the propriety of following that case now; for the principle on which the Court of Exchequer there intended to act was a right principle, but it was misapplied by them, and would be misapplied if followed here. I will not give at any length my reasons for thinking the principle in that case a sound one, as they are all stated by Mr. Gray in pp. 61–64 of his Treatise on Costs. I agree with my brother Wightman that where a defendant succeeds in reducing the damages for one individual cause of action the issue ought not to be divided; but in a case like *Anderson v. Chapman*, 5 M. & W. 488, where the plaintiff sued for *negligence and proved it only partially, or in a case [like the present where there is a count on a policy of insurance, and one loss is shown to have been caused by perils of the seas and one not, those are distinct matters for which separate actions might have been brought and separate pleas pleaded.

It is argued however that, as this is only one cause of action, the plaintiff could not have brought an action for partial loss before the voyage had come to an end. There is no authority for that, and the practice, I think, is to adjust and pay for partial loss during a voyage; and I do not see any reason why it should not be so. *Stewart v. Steele*, 5 Scott N. R. 927, which has been relied on, is really no authority at all. There the jury erroneously included in the amount of damages the costs that would have been incurred if the ship had been repaired, but which never were actually incurred, seeing that she was broken up. It was with respect to that that Maule, J., was speaking in the passage cited; and he refers to *Livie v. Janson*, 12 East 648 which fully establishes his proposition.

Rule absolute.

*THE QUEEN, on the prosecution of the Burial Board of AMERSHAM, *v.* The Overseers of COLESHILL. June 17. [*825]

Burial Acts.—15 & 16 Vict. c. 85, 18 & 19 Vict. c. 128.—*Parishes united for ecclesiastical purposes.*

1. Where two parishes or places each maintaining its own poor, are united together for ecclesiastical purposes, a Burial Board for the whole district, appointed by the vote of the vestry, or meeting in the nature of a vestry, is properly constituted, by virtue of stat. 18 & 19 Vict. c. 128, read in connection with stat. 15 & 16 Vict. c. 85: although this would have been otherwise under the 15 & 16 Vict. c. 85.

2. In such a case, in the contract for providing for the expenses of the burial ground, the Burial Board ought to fix the sum payable once for all;—not to fix one definite proportion for the amount to which each of the two parishes or places is to be chargeable in future: although this also would have been otherwise under the former Act.

3. In such a case, where money is borrowed by the Burial Board towards the expenses of providing the burial ground, the deed should charge the sum borrowed upon the future rates of the one part of the parish, and also upon the future rates of the other part. (a)

MANDAMUS to the overseers of the poor of the hamlet of Coleshill in the parish of Amersham in the county of Hertford.

The writ: after reciting that the hamlet of Coleshill was part of the parish of Amersham in the counties of Bucks and Herts, and before and at the time of the passing of the 18 & 19 Vict. c. 128, and 20 & 21 Vict. c. 81, was a place separately maintaining its own poor, and united for ecclesiastical purposes with the residue of the said parish, that is to say, with a place called Amersham, in the county of Bucks, also a place separately maintaining its own poor, and that those two places had a church and also a burial ground for their joint use, and that the inhabitants of those places had been accustomed to meet in one vestry for purposes common to such several places, and that the *vestry or meeting in the nature of a vestry of those two places did, on the 31st October, 1857, pursuant to the said Acts and [*826] other the Burial Acts in force in England, by and with the approval of one of the principal Secretaries of State, appoint a Burial Board for the two places, that is to say, for the parish of Amersham, in the counties of Bucks and Herts, and thence from time to time did supply vacancies therein, and exercise the same powers of authorization, approval and sanction in relation to such Burial Board, and such other powers as under those Acts are vested in the vestry of a parish or place separately maintaining its own poor, and such Burial Board then became the Burial Board under the Burial Acts for the parish of Amersham; and that the Burial Board, with the sanction of the vestry or meeting in the nature of a vestry of the parish of Amersham, and the approval of the Commissioners of the Treasury, did borrow the money required for providing, laying out and enclosing two several burial grounds theretofore, with the approval of one of the principal Secretaries of State, provided for the parish of Amersham under the Burial Acts to be used, the one as a consecrated and the other as an unconsecrated burial ground, that is to say, the sum of 1600*l.*, and charge the future poor rates of the parish of Amersham

(a) This is the case referred to by Crompton, J., during the argument in *Reg. v. The Overseers of Walcot, supra*, p. 557.

with the payment of such money and interest thereon; and that the Burial Board did require the sum of 152*l.* for defraying expenses incurred by them in carrying the said Acts into execution, that is to say, for paying the agreed interest on the principal money the sum of 72*l.*, and the further sum of 80*l.*, being a sum equal to or exceeding one-fiftieth part of the principal money so borrowed, which the Burial Board did then think proper *to be then being once for the then ~~*827]~~ current year by them set aside out of the moneys charged as aforesaid, for the purpose of providing a sinking fund for paying off the principal money, and that the sum required by the Burial Board in respect of the portion of such expenses to be borne by the hamlet of Coleshill, such sum having been first ascertained by apportioning such expenses among the two places, in proportion to the value of the property in such several places as rated to the relief of the poor, was the sum of 24*l.* 15*s.* 1*d.*; and that the Burial Board for the purpose of obtaining payment according to law of that sum of 24*l.* 15*s.* 1*d.* by a certain certificate or order under the hands of such number of the Burial Board as were authorized to exercise the powers of the Board, bearing date the 18th of October, 1859, and addressed to the defendants, did direct them to pay the sum of 24*l.* 15*s.* 1*d.* out of the rates for the relief of the poor of the hamlet of Coleshill; which order or certificate was afterwards served, and that afterwards, on divers days and times, and particularly on the 30th November, 1859, they were required on the part and behalf of the Burial Board to obey the certificate or order; yet that they not regarding their duty as such overseers in that behalf did absolutely neglect and refuse to obey the said certificate or order, to the great damage and grievance of the parish of Amersham, and in contempt of the said certificate or order: commanded the defendants to obey the said certificate or order of the Burial Board for the parish of Amersham, and pay out of the rates for the relief of the poor of the said hamlet, as directed by the said certificate or order, the said sum of 24*l.* 15*s.* 1*d.*, and if necessary levy ~~*828]~~ the same *by rate on the said hamlet, and do all things necessary in that behalf, &c. .

The return stated, that the hamlet of Coleshill was not part of the parish of Amersham in the writ mentioned as therein suggested, but, on the contrary thereof, the hamlet of Coleshill was a parish wholly separate and distinct from the parish of Amersham, having separate overseers of the poor, and separately maintaining its own poor, and also having its own vestry wholly separate and distinct from the vestry of the parish of Amersham; that the two places, to wit the parish of Amersham and the parish or hamlet of Coleshill, had not a church or burial ground for their joint use, nor had the inhabitants of the said several parishes or places ever been accustomed to meet in one vestry, as in the writ suggested; that no vestry or meeting in the nature of a vestry of the several parishes or places ever did appoint such Burial Board as in the writ suggested, but that, on the contrary thereof, the vestry or meeting in the nature of a vestry, at which the supposed Burial Board was appointed as in the writ mentioned, was a meeting of the vestry of the parish of Amersham only, and the Burial Board so appointed at the said meeting, as in the writ mentioned, was appointed

by the vestry of the parish of Amersham only, without the sanction, consent or concurrence of the vestry, or any meeting in the nature of a vestry, of the parish or hamlet of Coleshill; and that no vestry or meeting in the nature of a vestry of the parish or hamlet of Coleshill ever sanctioned, consented to or concurred in the said appointment; that although the Burial Board did as in the writ suggested, charge the future poor rates of the parish of Amersham with the payment of the money and interest *in the writ mentioned, the Burial Board [*829 never did in fact charge the future poor rates of the hamlet of Coleshill with the payment of the said money and interest, &c.

Issue having been taken on the return, the cause went to trial; when a verdict was taken for the prosecutors, subject to the following special case, which was stated by an arbitrator, in pursuance of an order of nisi prius.

Amersham, otherwise Agmondesham (which is for the purposes of this case, and for those purposes only, called Amersham proper), is in the county of Buckingham, and adjoins Coleshill, which is in the county of Hertford. One church, which is in Amersham proper, is used for marriages, baptisms, and public worship by the inhabitants of both places; and some inhabitants of Coleshill have specific pews allotted to them in it. The rector of Amersham receives as such rector the tithes of Coleshill; and the presentations to such rectory describe it as "the rectory of Agmondesham, in the county of Bucks." There are three dissenters' chapels in Amersham proper, but no place of public worship in Coleshill. Adjoining the church is a churchyard, in which the bodies of persons dying in either of the places at all times before the 1st January, 1860, were buried as of right; and the churchyard during all that time, up to the time of its being closed, was a burial ground for the joint use of the two places. There were also burial places in connection with two of the chapels.

The registrations of baptisms, marriages and burials, have always heretofore been made in register books common to both places. The register book of burials between the years 1678 and 1726 is headed, "The names of all such persons as were buried in the parish church of Agmondesham, in the county of Bucks." For the *period [*830 between 1726 and 1812 the baptisms, marriages and burials in the parish are registered in one book, to which there is not any heading; and for the period between 1813 and the 30th May, 1858, there are registered in separate books, each of which is headed respectively "Burials," "Baptisms" and "Marriages" "in the parish of Amersham, in the county of Bucks, in the year ____." Church rates have been made for the repairs of the church, and the church is, from 1658 to 1815, styled in these "the parish church of Amersham, in the county of Buckingham;" and, from 1815 to 1852, "the parish church of Amersham, in the counties of Buckingham and Hertford." These rates have always been made on and paid by the inhabitants of each of the places. There is no church rate extant earlier than 1658, and since 1852 none has been made. One of such church rates made in 1686 is signed by thirteen ratepayers, one of whom was rated in Coleshill and not in Amersham proper. These rates were made at vestry meetings held in the vestry of the church. Notices relating to

the meetings were posted on the church and on the chapels before named, but not in any other place. Resident ratepayers of Coleshill attended these meetings, some of whom were and some were not also rated in Amersham proper. In one instance the churchwarden who made the rate was a ratepayer in Coleshill as well as in Amersham proper, but no one actually residing in Coleshill has been churchwarden. Amersham proper contains about 3000, and Coleshill about 6000 inhabitants. And the rateable value of property as rated to the relief of the poor is—

In Amersham proper	£8965	14	8
In Coleshill	. . .	1758	6 9

*881] Each of the places has, since 1658, separately *maintained its own poor. At the present time each appoints its own overseers, surveyors of highways, assessors of taxes and constables, and makes out its own jury list and list of voters. Amersham proper separately returns two, and Coleshill one, member to the board of guardians.

There are in existence eight certificates, ranging from 1704 to 1755, signed by the overseers of Coleshill, acknowledging paupers who resided in Amersham to be settled in Coleshill, and in these Coleshill is described as being in the parish of Amersham; and there is one of the dates, 1789, signed by the overseers of Amersham, in which Coleshill is called "the hamlet of Coleshill in the county of Hertford." As to the period preceding 1658, there is a document produced from a chest called "the rectory chest," which chest is kept in the custody of the rector, which document is endorsed "the accounts of the receipts and distribution of the money collected for the poor of Agmondesham in the year 1618," and names one set only of churchwardens and overseers. This has a heading "Coleshill," under which are entered the contributors in Coleshill; and also a heading "Weedon Hill and Chesham Boyes," under which are entered six contributors. Weedon Hill is in Amersham proper, but Chesham Boyes is and always was a separate parish, with its own church; but it is bounded on the south and west by Weedon Hill and another of the divisions of Amersham proper. The defendants submit that this document, by reason of its custody, is not evidence against them.

There are orders of removal, ranging from 1766 to 1828, from each of these places to the other; and in these Coleshill is described as the hamlet of Coleshill, in *the county of Hertford. In one order *882] of maintenance in bastardy, signed by the Rev. J. T. Drake, the late rector of Amersham, Coleshill is called the parish of Coleshill, but in this order "Coleshill" has been inserted in a printed form, in which the word "parish" is printed.

Meetings for the transaction of the above named separate business have been held separately in each of the places: the meetings for Amersham proper in the vestry, and after notice posted as above stated for vestry meetings at which church rates were made: the meetings for Coleshill in an inn in Coleshill. These meetings have been called by the overseers of Coleshill; and notices relating thereto have been posted on the door of the inn, and also on the church and

chapels. Ratepayers of Coleshill resident in Amersham attended and voted at these meetings for Coleshill.

In the following instances business which related exclusively to Amersham proper was transacted at vestry meetings, at which business relating to both places was also transacted, that is to say—

1839. April 4th.

1st. Churchwardens chosen.

2d. A poor rate made.

3d. Church rate proposed and the question adjourned.

1839. April 19th.

1st. Churchwardens' accounts passed.

2d. Church rates made.

3d. Highway rate made.

4th. 10*l.* voted for making out the poor and police rates.

5th. List of persons excused from poor rates revised and re-newed.

*6th. Ordered that the churchwardens get the church [*833 and market clocks repaired.

1841. Dec. 4th.

1st. Church rate made.

2d. An overseer chosen.

1843. May 13th.

1st. Accounts of churchwardens allowed.

2d. Church rate made.

3d. Highway rate made.

At this last meeting a resident ratepayer of Coleshill, not rated in Amersham proper, was present and signed the allowance of churchwardens' accounts, but the vestry minute book is signed by the chairman only. This same resident ratepayer of Coleshill also signed the allowance of churchwardens' accounts, made at a meeting held the 10th of May, 1845, at which business relating to the church only was transacted.

1845. July 16th.

1st. Church rate made.

2d. An overseer chosen.

1846. 5th December.

1st. Poor rate made.

2d. Resolution that where the rateable value under 5*l.* be rated to poor, church and highways, but that the collector apply for payment to the owners.

The precepts of the high constable requiring the payment of the general county rate for Coleshill are headed "county of Hertford," and in some of these Coleshill is called "the parish of Coleshill."

Among the records deposited in the Public Record Office, London, to wit, Land Tax Book, 1698, it is thus contained:

*“Extracts.”

"An account of the duplicates brought into their Majesties [*884 Remembrancer's office, for the first ayd of 4*s.* in the pound, how much every duplicate amounts unto, and the name of every division, hundred and place in every county within England and Wales, Being for the yeare

1693
Adhuc, Com Bucks.

Hundreds, &c. Townes or Parishes.	The Yeare Real.	The Yeare Personal.
The Hundred of Burnham. Ches	ham Division.	
Amersham, Towne and Woodrow } {	284,10,00	28,01,06
Burnham Division.		
Beaconsfield.	332,03,00	
Adhuc Com Hertford.		
Dacorum Hundred		
Coltshill	186,04,00	

By an order of the Queen in council, dated 21st July, 1855, it was ordered that burials should be discontinued from and after the 1st August, 1855, in certain burial grounds and places for burial in the said parish of Amersham, that is to say: in the portion of the parish [*835] churchyard lying on the south of the *church as far as the foot-path on the east side; also in the old part of the old meeting-house burial ground adjoining the day school, also in the upper meeting-house and in the burial ground attached to the same; and from and after the 1st January, 1860, wholly in the parish churchyard, in the vault beneath the chapel attached to the church, and in the catacombs in the building adjoining the church. The old meeting-house and upper meeting-house are two of the three dissenters' chapels before named.

By a further order of the Queen in council, dated the 13th August, 1855, it was ordered that an exemption be made from the said first-mentioned order in favour of the catacombs in the buildings adjoining the church of Amersham, of the vault beneath the chapel attached to the church, and of all the family brick-graves and vaults in the church-yard: provided that in the catacombs leaden coffins be used as heretofore, and that the vaults and graves, when required, be opened without disturbing ground that has been already buried in; and that in the catacombs, as well as in the vaults and graves, each coffin be imbedded in a layer of powdered charcoal not less than four inches in thickness, and be covered over with brickwork properly cemented.

After the passing of the Act 20 & 21 Vict. c. 81, to amend the Burial Acts, that is to say, on or about the 26th September, 1857, the following requisition in writing, of more than ten of the ratepayers

(no one of whom was an actual resident in Coleshill), was delivered to the then "churchwardens of the parish of Amersham, in the counties of Buckingham and Hertford."

"We, the undersigned rated inhabitants of the parish of Amersham, in the counties of Buckingham and *Hertford, do hereby re-[*836]quest you the churchwardens of the said parish to convene a general vestry meeting of the ratepayers of the said parish for the special purpose of determining whether a burial ground shall be provided (under the provisions of the several Acts of Parliament made and passed to amend the laws concerning the burial of the dead in England beyond the limits of the metropolis, and to amend the Acts concerning the burial of the dead in the metropolis, and to make further provision for the burial of the dead in England beyond the metropolis), for the said parish of Amersham. Dated the 22d September, 1857."

(Here followed several names.)

In pursuance of this requisition the following notice was drawn up and signed by the churchwardens of Amersham.

"Parish of Amersham,
"Bucks.

"Notice is hereby given that, in pursuance of a requisition in writing, dated the 22d September inst., signed by more than ten of the ratepayers of this parish, and directed to us the undersigned as churchwardens of the parish of Amersham, in the counties of Buckingham and Hertford, a general vestry meeting of the ratepayers of the said parish will be holden at the vestry room of the church of the said parish, on Friday, the 9th October next, at ten o'clock in the forenoon, for the purpose of determining whether a burial ground shall be provided for the said parish of Amersham under the provisions of the several Acts of Parliament made and passed to amend the laws concerning the burial of the dead in England beyond the limits of the metropolis, and to amend the Acts concerning the burial of the dead in the *metropolis, and to make further provision for the burial [*837]of the dead in England beyond the metropolis.

"Dated the 26th September, 1857.

"A. BUTCHER.
"WILLM. WELLER. } Churchwardens."

This notice was posted upon the principal doors of the parish church of Amersham, and upon the principal door of each of the three dissenting chapels in Amersham, prior to the commencement of divine service on the morning of Sunday, the 27th September, 1857, being more than seven days before the day appointed for holding such meeting. This notice was not posted in any other place.

On the 9th October, 1857, a vestry meeting was held in pursuance of the notice of the 26th September, 1857, at which meeting several non-resident ratepayers of Coleshill, but all of whom were resident ratepayers of Amersham proper, were present, and took part in the proceedings. And it was resolved:—

First. "That a burial ground should be provided for the parish of Amersham, in the counties of Buckingham and Hertford, under the

provisions of the several Acts of Parliament now in force relating to the burial of the dead beyond the metropolis."

"Secondly. That the meeting should stand adjourned to the 23d October inst., at ten o'clock in the forenoon, for the purpose of appointing a Burial Board for the parish of Amersham, in the counties of Bucks and Herts, and that notice of such adjourned meeting and the purpose thereof should be given by the churchwardens in the usual manner."

On the 10th October, 1857, a copy of the resolutions passed at the *838] vestry meeting of 9th October, *signed by the chairman of the meeting, was forwarded to Sir George Grey, Bart., one of her Majesty's principal Secretaries of State, for his approval; and for his approval of a Burial Board being provided for the parish of Amersham under 20 & 21 Vict. c. 81, s. 9; and requesting such approval by the 23d October, the day to which the vestry stood adjourned.

On the 17th October, 1857, a letter was received from Sir G. Grey, addressed to the vestry clerk of Amersham, requesting to know whether there was any objection to the proposed arrangement on the part of the hamlet of Coleshill.

On the 19th October, 1857, a meeting was held at Coleshill, pursuant to the following notice, the date of which was admitted to be 10th October.

"The hamlet of Coleshill, in the county of Hertford.

"We hereby convene a meeting of the vestry of this hamlet, to be held at the Fleur-de-lis, Coleshill, within the said hamlet, at four o'clock in the afternoon of Monday, the 19th October inst., for the purpose of determining whether a burial ground shall be provided for the said hamlet, under the provisions of the Acts of Parliament of the 15 & 16 Vict. c. 85, the 16 & 17 Vict. c. 184. And if it be resolved by the vestry that such burial ground shall be provided, to appoint not less than three or more than nine persons, being ratepayers of the hamlet, to be the Burial Board of such hamlet.

"CHRISTOPHER GROVE. }
"GEORGE GROVE. } Overseers."

This meeting was attended in nearly equal numbers by inhabitants of Coleshill and by inhabitants of Amersham proper, who were ratepayers of but not resident in Coleshill. At this meeting the Rev. John Tyrwhitt Drake, *the rector of Amersham, claimed to *839] preside, and, although an objection was taken, he did so preside. At that meeting Mr. James Christmas, an inhabitant ratepayer of Coleshill, proposed "That a burial ground be provided for the hamlet of Coleshill." An objection was then taken to any ratepayer who was not resident in Coleshill taking part in proceedings for the formation of a Burial Board for Coleshill. And the proposition of Mr. Christmas was not seconded.

It was then proposed by Mr. Goddard, and seconded by Mr. Arthur Butcher, "That it is inexpedient to provide a separate ground for the hamlet of Coleshill, but that a burial ground be provided for that portion of the hamlet of Coleshill, which is in the parish of Amersham, in the county of Herts, jointly with that portion of the parish of Amersham which is in the county of Bucks."

For the last proposition	12
Against	10
Majority in favour of	2

Neither the proposer nor seconder of this resolution was an inhabitant of Coleshill, but they were inhabitant ratepayers of Amersham proper, and also ratepayers of Coleshill. Ten of the twelve persons of whom the majority was composed were not inhabitants, although they were ratepayers, of the hamlet of Coleshill.

It was then proposed by Mr. Charsley, and seconded by Mr. James Stratford (neither of whom was an inhabitant of Coleshill), "That the meeting be adjourned to the vestry room of the parish church of Amersham on Friday next, the 23d inst., at ten o'clock in the forenoon, for the purpose of appointing a Burial Board for that portion of the hamlet of Coleshill in the parish of *Amersham, in the [*840 county of Hertford, jointly with that portion of the parish of Amersham in the county of Bucks."

An amendment was proposed by Mr. Christmas, and seconded by Mr. T. Butcher, who were both inhabitants and ratepayers of Coleshill, "That this meeting be adjourned to this day fortnight, Nov. 2d, at four o'clock, in the Coleshill school."

For the amendment	10
Against it	18
Majority against the amendment	8
For the original motion	18
Against it	10
Majority in favour of the original motion	8

Ten of the thirteen persons of whom the said majorities respectively consisted were not inhabitants, although they were ratepayers of the hamlet of Coleshill.

Mr. James Christmas, at that meeting, on behalf of the hamlet of Coleshill, demanded a poll of the hamlet upon the proceedings.

By direction of the chairman, the poll was then commenced of those present at the meeting, and he then adjourned the meeting to the "Fleur de Lis," within the hamlet, on Wednesday, the 21st October, 1857, at ten o'clock, at which time and place he directed that the polling was to be resumed, and finally concluded at two o'clock on that day.

The minutes of this vestry were signed by the chairman alone, such of the ratepayers as were inhabitants refusing to sign them, alleging that the proceedings were *illegal. The vestry minute book [*841 of Coleshill has usually been signed by the persons present at each vestry.

The following notice was then drawn up and signed by Mr. Christmas:—

"To the overseers of the hamlet of Coleshill, in the county of Hert-

fort, and The Rev. John Tyrwhitt Drake, the chairman of the vestry meeting held in and for the said hamlet on the 19th October, 1857.

"I hereby give you notice that I abandon the demand of a poll made by me at the said vestry meeting holden in and for the said hamlet of Coleshill on the 19th October instant, and that I do so on the following grounds:

"First. That the resolution proposed and seconded at the said vestry, and upon which I demanded a poll, was not a resolution that could be legally put and carried at such vestry under the notice in pursuance of which such vestry was holden.

"Second. That the owners of property within the said hamlet, not being the occupiers thereof, who voted at such vestry upon the said resolution, were not duly or legally qualified to do so, inasmuch as the provisions of the Act of Parliament of the 13 & 14 Vict. c. 99, whereby the vestry of any parish may, from time to time, declare that the owners of certain tenements within the parish shall be assessed to the rates for the relief of the poor in respect of such tenements instead of the occupiers thereof, had not, previously to such owners being rated to the relief of the poor of the said hamlet, been complied with.

"Third. That, inasmuch as the said vestry meeting stands adjourned generally until Friday next, the 23d October instant, it is not lawful for a poll of the hamlet *to be taken upon any resolution or subject proposed at such vestry until the proceedings of such vestry shall be finally closed.

"Fourth. That the poll having been commenced on Monday, the 19th October instant, and the further taking thereof adjourned until Wednesday, the 21st October instant, is illegal and bad for want of continuance in such polling."

This notice was served, on the 20th October, 1857, upon the Rev. John Tyrwhitt Drake, who acted as chairman of the said meeting, and also on Mr. George Grove, the surviving overseer of Coleshill, Mr. Christopher Grove, the other overseer, having died, and no further proceedings were taken as to such poll.

On the 19th of October, 1857, a letter, of which the following is a copy, was forwarded to Sir George Grey.

"Amersham, Oct. 19th, 1857.

"Burial Acts.

"Sir "Amersham and Coleshill.

"In reply to your letter of the 16th instant, I have the honour to inform you that a meeting in vestry of the ratepayers of the hamlet of Coleshill, in the parish of Amersham, was held this day, pursuant to notice given, in accordance with the provisions of the Acts 15 & 16 Vict. c. 85, 16 & 17 Vict. c. 134, and 18 & 19 Vict. c. 128, at which meeting resolutions were passed, a copy of which, extracted from the minutes and signed by the chairman, I herewith forward, together with a copy of the notice calling the meeting. As the vestry meeting for the parish stands adjourned to the 23d instant for the election of a Burial Board, I am directed now to request your approval, as one of *843] Her Majesty's *Principal Secretaries of State, to the appointment of a Burial Board for the whole parish of Amersham, in-

cluding Coleshill, in pursuance of the resolutions passed at the two vestries, and to request the favour of that approval by the 23d instant.

'I have the honour to remain, &c.

**"FREDK. CHARSLEY,
"Vestry Clerk."**

The order of the Poor Law Commissioners ordering the appointment of the said vestry clerk is addressed to "The Churchwardens and Overseers of the Poor of the Parish of Amersham, in the County of Buckingham."

The vestry clerk has not acted in any matter relating exclusively to Coleshill; and his salary is paid exclusively from the rates of Amersham proper.

In the letter was enclosed a copy of the resolutions therein mentioned.

On the 24th October, 1857, the vestry clerk of Amersham received a letter from the Secretary of State, of which the following is a copy:

"Sir, "Whitehall, 23d Oct., 1857.

"I am directed by Secretary Sir Geo. Grey, to acknowledge the receipt of your letter of the 9th inst., enclosing a copy of the resolutions passed at a meeting of a vestry of the ratepayers of the hamlet of Coleshill on that day, in reference to providing a burial ground and appointing a Burial Board for the said hamlet, in conjunction with the parish of Amersham. And I hereby signify to you Sir Geo. Grey's approval, as required by the 9th section of the 20 & 21 Vict. c. 81, of the appointment of a Burial Board for that portion of the hamlet of Coleshill, in the parish of Amersham, in the county of *Hertford, jointly with that portion of the parish of Amer- [**844 sham, in the county of Bucks. "I am, Sir,

"Your obedt. Servt.,

"H. WADDINGTON."

In pursuance of the resolution made at the vestry or public meeting held on the 9th October, 1857, an adjourned meeting was held on the 23d October, of the holding of which the following notice was given.

"Parish of Amersham, in the counties of Bucks and Herts.

"Notice is hereby given that a general vestry meeting of the rate-payers of the said parish will be holden by adjournment from the 9th October inst., at the vestry room of the church of the said parish, on Friday, the 23d October inst., at 10 o'clock in the forenoon, for the purpose of appointing not less than *three*, or more than *nine*, persons, being ratepayers of the said parish, to be the Burial Board of such parish, under the provisions of the several Acts of Parliament of the 15 & 16 Vict. c. 85, 16 & 17 Vict. c. 134, the 18 & 19 Vict. c. 128, and the 20 & 21 Vict. c. 81. Dated the 10th October, 1857.

"A. BUTCHER,
"WILLM. WELLER, { Churchwardens."

At this meeting some ratepayers of Coleshill were present, but not any one who was not also an inhabitant ratepayer of Amersham proper. The proceedings of the meeting are recorded by the following minute:—

"Amersham, 23d Oct. 1857.

"At a vestry or public meeting of the ratepayers of the parish of

*845] Amersham, in the counties of Bucks and *Herts, held in the vestry room of the church of the same parish, this day, by adjournment from the 9th October, and of which notice under the hands of the churchwardens of the said parish had been given in the usual manner. (Here followed the notice.)

"It was reported to the vestry by Mr. Arthur Butcher. That at a meeting of the ratepayers of that portion of the hamlet of Coleshill, in the county of Herts, which is in the parish of Amersham, held pursuant to notice in the usual manner given at least seven days prior to the 19th October inst., on which day the same was holden: It was resolved, 'That it is inexpedient to provide a separate ground for the hamlet of Coleshill, but that a burial ground be provided for that portion of the hamlet of Coleshill which is in the parish of Amersham, in the county of Hertford, jointly with that portion of the parish of Amersham which is in the county of Bucks.' And that it was also resolved, 'That this meeting be adjourned to the vestry room of the parish church of Amersham, on Friday next, the 23d inst., at 10 o'clock in the forenoon, for the purpose of appointing a Burial Board for that portion of the hamlet of Coleshill, in the parish of Amersham, in the county of Hertford, jointly with that portion of the parish of Amersham, in the county of Bucks.'

"Moved by Mr. Goddard, seconded by Mr. T. H. Morten, 'That the Burial Board consist of nine members.' And certain persons having been nominated, and some of the same having been declared, on a show of hands then and there in fact taken, to have been elected, a poll was demanded and granted, and it was resolved that the said meeting should be adjourned to The Crown Inn, in Amersham, on *846] the 28th October aforesaid, at 10 o'clock *in the forenoon, for the purpose of taking such poll; and that such poll should be then commenced and continued until 4 o'clock in the afternoon of the same day, when the same should be adjourned to the 29th October aforesaid, at 10 o'clock in the forenoon, and continued open until 4 o'clock in the afternoon of the same day, when such poll should finally close, and stand further adjourned to Saturday, the 31st October aforesaid, for the declaration of such poll in the said vestry room."

No formal notice was given to the overseers of Coleshill to attend the poll with their book; but the rate books of Coleshill were produced by a person who had been employed by Mr. C. Grove, one of the overseers of Coleshill, to collect the rates for him, and who had the said rate books for that and not for any other purpose. Before the poll was taken, Mr. C. Grove had died, and the said books were produced at the said poll without any express authority from the surviving overseer.

The aggregate amount at which those of the ratepayers of Coleshill who polled was assessed was between one-third and one-half of the entire assessment of Coleshill; and among those who polled were two resident ratepayers of Coleshill, and two others who were actually residing in Coleshill, but not then rated, claimed to be rated, and were so rated and polled. Among them was one of the defendants, who had taken a farm at Coleshill from the 29th September preceding, and who first went into personal residence thereon on the day

on which he polled. All the votes given by these were given to candidates who were elected. The other ratepayers of Coleshill who polled did not reside therein.

The adjourned meeting was also accordingly held on the 31st October aforesaid, when, in the vestry room at *Amersham, the Rev. John T. Drake, the rector and chairman of the meeting, reported, as the fact was, that the majority of votes at the said poll was in favour of the Rev. J. T. Drake, T. T. Drake, Esq., and seven others, and he thereupon declared these persons to be duly elected the Burial Board for that portion of the parish of Amersham, in the county of Bucks, jointly with that portion of the hamlet of Coleshill, in the county of Herts, which is in the parish of Amersham. The nine members, so as aforesaid elected on the said Burial Board, were all resident ratepayers of the parish of Amersham proper; and four of them were ratepayers of, but not residents in Coleshill, and they still are members of the said Board with the exception of one who has since died.

The seal of this Board has the following inscription:—

“The Burial Board for the parish of Amersham in the counties of Buckingham and Hertford.”

The first meeting of this Burial Board was held on the 6th November, 1857, when it was resolved, amongst other things, that two separate and distinct burial grounds should be provided, to be used as consecrated and unconsecrated burial grounds, subject to the approval of the Secretary of State; and also that a piece of ground, about one acre and a half in quantity, forming a portion of the lower end of Tenter Field, part of the glebe land of the parish, should be provided as a consecrated ground; and that a piece of ground, of about three quarters of an acre, and part of Arbour Field and the adjoining meadow, and the property of Thomas Tyrwhitt Drake, Esq., should be provided as the unconsecrated burial ground.

*On the 24th of November, 1857, Sir G. Grey, being then one of her Majesty's principal Secretaries of State, signified his approval that two separate and distinct grounds should be provided as aforesaid.

A meeting was held on the 9th June, 1858, in the vestry room aforesaid, in pursuance of the following notice; copies of which were posted on the doors of the church and chapels in the usual manner:—

“Parish of Amersham, in the counties of Bucks and Herts.

“We, the churchwardens of the parish of Amersham, in the counties of Bucks and Herts, do hereby convene a meeting of the vestry of the said parish to be held at the vestry room of the church of the said parish on Wednesday, the 9th June next, at 10 o'clock in the forenoon, under the provisions of the 15 & 16 Vict. c. 85, 16 & 17 Vict. c. 134, 18 & 19 Vict. c. 128, and 20 & 21 Vict. c. 81, relating to the burial of the dead in England beyond the metropolis, for the purpose of approving the amount of salary to be paid by the Burial Board of the said parish to the clerk appointed by the said Burial Board. And also the amount to be allowed to such clerk for the use of an office for holding the meetings and transacting the business of the said Burial Board. And also for the purpose of appointing two persons to be auditors of the accounts of the said Burial Board, and

appoint the time in each year at which such accounts shall be audited. And also for the purpose of authorizing the amount to be expended by such Burial Board, in providing and laying out the burial grounds for the said parish under the provisions of the said Acts. And also for the purpose of approving the appropriation by the said [Burial Board of the two pieces of land *proposed to be taken 849] by the said Board under the provisions of the said Acts, for the purpose of forming a consecrated and an unconsecrated burial ground for such parish. Dated the 29th May, 1858.

"A. BUTCHER, } Churchwardens of the parish
"W.M. WELLER, } of Amersham."

At this meeting it was resolved: "That this vestry do authorize the expenditure by the Amersham Burial Board of a sum of money not exceeding 1600*l.* for the expenses incurred or to be incurred by such Board in providing and laying out a consecrated and unconsecrated burial ground for the parish of Amersham in the counties of Bucks and Herts." This was afterwards approved of by the Commissioners of Her Majesty's Treasury. And the meeting approved of the appropriation of two pieces of land proposed to be given, and which were afterwards in fact given by deed of conveyance to the said Burial Board by Thomas Tyrwhitt Drake, Esq., for the purpose of making a consecrated and an unconsecrated burial ground, being the two pieces of land before mentioned.

On the 9th July, 1858, a meeting was held in the vestry room aforesaid, in pursuance of the following notice; copies of which were posted on the church and chapels aforesaid:—

"Parish of Amersham, in the counties of Bucks and Herts.

"We, the undersigned, the churchwardens of the parish of Amersham, in the counties of Bucks and Herts, do hereby give you notice that a vestry meeting of the said parish will be held at the vestry room of the church of the parish on Friday, the 9th July inst., at 10 o'clock in the forenoon, under the provisions *of the 15 & 16 [850] Vict. c. 85, 16 & 17 Vict. c. 134, 20 & 21 Vict. c. 81, and the several other Acts now in force relating to the burial of the dead in England beyond the metropolis, for the purpose of sanctioning the borrowing by the Burial Board for the said parish of the sum of money required for providing and laying out the new burial grounds for the said parish, under the said Acts, and charging the future poor rates of the said parish by the said Burial Board, with the payment of such money and the interest thereon; and also for the purpose of fixing the time at which one-third of the Burial Board of the said parish shall go out of office yearly. Dated the 2d July, 1858.

"A. BUTCHER, } Churchwardens of the parish
"W.M. WELLER, } of Amersham."

At that meeting it was resolved "That the meeting sanctions the borrowing by the Burial Board of the parish of Amersham, in the counties of Bucks and Herts, of the sum of 1600*l.*, the sum of money required for providing and laying out the new burial grounds for the said parish, and the charging the future poor rates of the said parish by the said Burial Board with the payment of such money and the interest thereon."

The two meetings last named were attended by ratepayers of Amer-

sham proper and by ratepayers of Coleshill, but no ratepayer who was resident in Coleshill attended.

Afterwards the Burial Board, with the approval of the Commissioners of Her Majesty's Treasury, borrowed the sum of 1600*l.*, the same being then required for the purposes aforesaid. And by deed, bearing date the 5th October, 1858, the Board charged the poor rates of the parish of Amersham, in the counties of *Buckingham and Hertford, with the payment of the said sum and interest thereon [*851 at the rate of 4*l.* 10*s.* per cent. per annum. (A copy of the deed formed part of the case.)

Before and at the time of the making the certificate or order hereinafter mentioned, the sum of 152*l.* was required by the Burial Board for repaying expenses incurred by them in the execution of the said Acts: that is to say, the payment of 72*l.*, being one year's interest on the money so borrowed as aforesaid, and the sum of 80*l.*, being a sum exceeding one-fiftieth part of the principal sum so borrowed, which the Burial Board thought proper to set aside once in the year for the purpose of providing a sinking fund for paying off the principal money so borrowed. And before and at the said time the value of the property as rated to the relief of the poor in that part of the parish of Amersham which is in the county of Buckingham by the then last effective rate for the relief of the poor was 8965*l.* 14*s.* 8*d.*, and the value of the property as rated to the relief of the poor in the hamlet of Coleshill, being that part of the parish of Amersham which is in the county of Hertford, was 1758*l.* 6*s.* 9*d.*

By a certificate or order given under the hands of three members of the Burial Board made at a meeting, held at the office of the clerk of the Burial Board at Amersham on the 18th October, 1859, and addressed to Mr. Thomas Ives and Mr. Henry George, overseers of the hamlet of Coleshill, being that part of the parish of Amersham which is in the county of Hertford, the said Thomas Ives and Henry George, then and still being the overseers of the said hamlet, and the officers authorized to make and levy rates for the *relief of the poor there, were ordered and directed to pay to Messrs. Butcher & Co., of Chesham, bankers, on behalf of the Burial Board of the parish of Amersham, in the counties of Bucks and Herts, on the 15th November, 1859, the sum of 24*l.* 15*s.* 1*d.* from the poor rates of the said hamlet, being that part of the parish of Amersham which is in the county of Hertford, for defraying the expenses of the said Burial Board according to the provisions in that behalf made in the Acts 16 & 17 Vict. c. 184, and 17 & 18 Vict. c. 87, and to take the receipt of the said Messrs. Butcher & Co. endorsed thereon for the said sum of 24*l.* 15*s.* 1*d.*, the same being the sum chargeable on the rates for the relief of the poor of the said hamlet on the apportioning the said sum of 152*l.* between the said hamlet and the said other part of the parish of Amersham in proportion to the value of the property in such places as rated to the relief of the poor.

The old churchyard and burial grounds directed to be closed by the order in council, were closed on the 1st January, 1860, since which day there have been fifty-two burials in the new cemeteries: eleven out of the fifty-two were of inhabitants of Coleshill, and the fees charged in respect of those eleven were the fees payable by par-

ishioners. Except these cemeteries and a part of the lower meeting-houses burial ground not included in the order in council, there is not any burial ground either in Amersham proper or Coleshill.

The order or certificate was duly served, and obedience to it duly demanded and refused. (The writ and the pleadings are to be considered part of the case.)

*853] The prosecutors contend that all the proceedings towards the formation of the Burial Board, and subsequently by or on behalf of the Burial Board, are valid and sufficient in the law to constitute the said Board the Burial Board for the parish of Amersham, that is to say, for the two places jointly; and to impose on the hamlet of Coleshill the duty of contributing towards the payments of the said sum of 1600*l.* and interest thereon, and on the defendants the duty of paying the said sum of 24*l.* 15*s.* 1*d.* as by the said certificate directed, and therefore they are entitled to retain the verdict.

The defendants contend that the said proceedings were not, nor were any or either of them, valid or effectual in law for the purposes aforesaid or either of them, and that therefore the verdict should be set aside, and a verdict entered for the defendants.

The question for the opinion of the Court is, Whether the prosecutors are entitled to retain the verdict.

The deed of charge was as follows:—

"KNOW ALL MEN BY THESE PRESENTS. WHEREAS the Burial Board for the parish of Amersham in the counties of Buckingham and Hertford, duly appointed and authorized under and by virtue of the powers and provisions of the several Acts 15 & 16 Vict. c. 85, the 16 & 17 Vict. c. 134, the 18 & 19 Vict. c. 128, and the 20 & 21 Vict. c. 81, some or one of them, have, with the sanction of the vestry of the said parish, and with the approval of the Commissioners of her Majesty's Treasury, (testified by the signatures of two of the said Commissioners hereunto affixed) borrowed from the persons hereinafter mentioned

*854] the sum *of 1600*l.* for and towards the expense of providing and laying out two burial grounds under the provisions of the said Acts or some or one of them, to be paid with interest as herein-after mentioned, and to be charged on the future rates for the relief of the poor to be assessed and levied within the same parish. Now THEREFORE we, the said Burial Board for the parish of Amersham, in the counties of Buckingham and Hertford, in consideration of the sum of 1600*l.* paid to us by William Betts, of Sandown, near Deal, in the county of Kent, Esquire," (here followed four other names) ("trustees of and for The Star Life Assurance Society in London,) the receipt of which money we do hereby acknowledge, do by this instrument, under our corporate seal, in virtue and pursuance of the powers and provisions of the said Acts, some or one of them, charge the future rates to be made and levied within that part of the said parish of Amersham which is in the county of Buckingham, and also the future rates to be made and levied within that part of the parish of Amersham which is in the county of Hertford, for the relief of the poor of the same parish or any part thereof, with the payment of the said principal sum of 1600*l.* and interest thereon at the rate of 4*l.* 10*s.* per centum per annum in the manner and at the times following, that is to say; the said principal sum to be repaid by equal instalments of 80*l.*

payable annually, and the first payment thereof to be made at the expiration of twelve calendar months from the day of the date hereof, and the interest on the said principal money or so much thereof as shall from time to time remain unpaid at the rate aforesaid, to be paid by equal half-yearly payments, the *first payment thereof to be made at the expiration of six calendar months from the day of [*855 the date hereof and every such payment to be made at the chief office of the said Star Life Assurance Society in London or Westminster, to or to the credit of the said William Betts, &c., or their assigns, or the survivors or survivor of them, or the assigns of the survivors, or the executors, administrators or assigns of the last survivor of them. Given under the corporate seal of the said Burial Board, this 5th day of October, 1858.

"We hereby approve of the borrowing of the above-mentioned sum, and charging the future poor rates of the parish of Amersham, in the counties of Bucks and Herts, with the payment thereof, with the interest thereon at the rate above mentioned, in the manner and at the times above mentioned.

HENRY WHITMORE. } Two of the Lords Commissioners of Her
K. J. LENNOX. } Majesty's Treasury.

"The common seal of the said Burial Board was hereto affixed at a meeting of the said Board, held on the 5th day of October inst., the date thereof, by the direction of the said Burial Board, in the presence of (C. S.)

"Geo. Isaacson, Clerk to the Burial Board, Amersham."

A receipt for the consideration money was endorsed.

The case was argued in Easter Term, on the 3d May, before COCK-BURN, C. J., CROMPTON and MELLOR, JJ.

O'Malley (*G. Tayler* with him), for the prosecutors.

Lush (*J. A. Russell* with him), for the defendants.

The arguments fully appear in the judgment of the Court. No authorities were cited.

*The questions raised turned on the construction of the Burial Acts, the following sections of which were referred to. [*856

15 & 16 Vict. c. 85, "An Act to amend the laws relating to the burial of the dead in the metropolis." After providing, by sect. 10, that the vestry of any parish in the metropolis may resolve that a burial ground shall be provided for the parish; and, by sect. 11, that in case they shall agree for that purpose, they shall appoint a Burial Board:

Sect. 19 enacts, "The expenses incurred or to be incurred by the Burial Board of any parish in carrying this Act into execution shall be chargeable upon and paid out of the rates for the relief of the poor of such parish; the expenses to be so incurred for or on account of any parish in providing and laying out a burial ground under this Act and building the necessary chapel or chapels thereon not to exceed such sum as the vestry shall authorize to be expended for such purpose; and the overseer or other officers authorized to make and levy rates for the relief of the poor in any parish shall, upon receipt of a certificate under the hands of such number of members of the Burial Board as are authorized to exercise the powers of the Board of the sums required from time to time for defraying any such ex-

penses as aforesaid, pay such sums out of the rates for the relief of the poor as the Board shall direct."

Sect. 20. "Provided always, that it shall be lawful for the Board, with the sanction of the vestry and the approval of the Commissioners of her Majesty's Treasury, to borrow any money required for providing and laying out any burial ground under this Act, and building a *857] chapel or chapels thereon, or any of such purposes, and *to charge the future poor rates of the parish with the payment of such money and interest thereon; provided that there shall be paid in every year, in addition to the interest of the money borrowed and unpaid, not less than one-twentieth of the principal sum borrowed, until the whole is discharged."

Sect. 23. "The vestries of any parishes which shall have respectively resolved to provide burial grounds under this Act may concur in providing one burial ground for the common use of such parishes, in such manner, not inconsistent with the provisions of this Act, as they shall mutually agree, and may agree as to the proportions in which the expenses of such burial ground shall be borne by such parishes, and the proportion for each of such parishes of such expenses shall be chargeable upon and paid out of the moneys to be raised for the relief of the poor of the same respective parishes accordingly; and, according and subject to the terms which shall have been so agreed on, the Burial Boards appointed for such parishes respectively shall, for the purpose of providing and managing such one burial ground, and taking and holding land for the same, act as one joint Burial Board for all such parishes, and may have a joint office, clerk, and officers, and all the provisions of this Act shall apply to such joint Burial Board accordingly; and the accounts and vouchers of such Board shall be examined and reported on by the auditors of each of such parishes; and the surplus money at the disposal as aforesaid of such Board shall be paid to the overseers of such parishes respectively in the same proportions as those in which such parishes shall be liable to such expenses."

Sect. 24. "For the more easy execution of the purposes *of 858] this Act the Burial Board of every parish appointed under it shall be a body corporate, by the name of 'The Burial Board for the parish of _____ in the county of _____'; and where the Burial Boards of two or more parishes act as and form one joint Burial Board for all such parishes for the purposes aforesaid, such joint Board shall for such purposes only be a body corporate by the name of 'The Burial Board for the parishes of _____ and _____ in the county of _____'."

By the interpretation clause, sect. 52, "'parish' shall mean every place having separate overseers of the poor, and separately maintaining its own poor."

16 & 17 Vict. c. 134, s. 7, extends certain provisions in 15 & 16 Vict. c. 85, and, among them, those from sect. 10 to 42 (both inclusive), to parishes, &c., not in the metropolis.

17 & 18 Vict. c. 87, makes further provision for the burial of the dead beyond the limits of the metropolis.

18 & 19 Vict. c. 128, entitled "An Act further to amend the laws

concerning the burial of the dead in England," after reciting the three previous Acts, enacts:

Sect. 10. "If the ratepayers assembled at any vestry duly convened under the provisions of this Act shall, in pursuance of public notice duly given in that behalf, resolve unanimously that any new burial ground to be provided for their parish, under the provisions of this Act, shall be held and used in like manner and subject to the same laws and regulations in all respects as the existing burial ground or churchyard of the said parish, the land for such new burial ground may be conveyed and settled in accordance with such resolution, anything in this or the said recited Acts notwithstanding, and in such case it shall not be necessary to set apart to *remain unconsecrated any portion of the land so conveyed and settled: [*859] Provided always, that if at any time within ten years thereafter the vestry, duly convened under the provisions of this Act in pursuance of public notice duly given in that behalf, should determine that an unconsecrated burial ground should be also provided for such parish, all the powers and provisions of the said recited Acts and this Act may be put in force and shall be applicable for providing such unconsecrated burial ground separately, in like manner as they might have been put in force and been applicable for providing an ordinary burial ground for such parish."

Sect. 11. "Where a parish or place has been united with any other parish or place, parishes or places, for all or any ecclesiastical purposes, or where two or more parishes or places have heretofore had a church or a burial ground for their joint use, or where the inhabitants of several parishes or places have been accustomed to meet in one vestry for purposes common to such several parishes or places, it shall be lawful for the vestry or any meeting in the nature of a vestry of such several parishes or places in any of the cases aforesaid, and whether any one or more of such parishes or places do or do not separately maintain its own poor, to appoint a Burial Board, and from time to time to supply vacancies therein, and to exercise the same powers of authorization, approval, and sanction in relation to such Burial Board, and such other powers as under the said Acts and this Act are vested in the vestry of a parish or place separately maintaining its own poor; and the Burial Board so appointed shall have all the powers for providing a burial ground for the common use of such several parishes or places, and for facilitating interments *and otherwise, as if [*860] such several parishes or places had been a parish separately maintaining its own poor; and the expenses of the Burial Board appointed under this provision shall be borne by the several parishes or places for which such Board is appointed, and shall be apportioned among them by such Burial Board in proportion to the value of the property in such several parishes or places as rated to the relief of the poor; and the sums required by the Burial Board in respect of the portion of such expenses to be borne by any such parish or place shall be paid out of the rates for the relief of the poor in such parish or place, in like manner as if such Burial Board had been appointed for such parish or place alone."

Sect. 12. "The vestry or meeting in the nature of a vestry of any parish, township, or other district not separately maintaining its own

poor, which has heretofore had a separate burial ground, may appoint a Burial Board, and from time to time supply vacancies therein, and may exercise the same powers of authorization, approval, and sanction in relation to such Burial Board, and such other powers as under the said Acts and this Act are vested in the vestry of a parish separately maintaining its own poor; and the Burial Board so appointed shall have all the powers for providing a burial ground and otherwise as if such parish, township or other district had been a parish separately maintaining its own poor."

By sect. 21 the previous Acts of 15 & 16 Vict., 16 & 17 Vict. and 17 & 18 Vict. and this Act "shall be read and construed together as one Act."

20 & 21 Vict. c. 81. "An Act to amend the Burial Acts."

*Sect. 1. "All acts authorized to be done by any Burial Board, with the approval, sanction, or authority of the vestry or vestries of the parish or parishes for which such Board is constituted, may, where a joint Burial Board is constituted for more than two parishes, be done with the approval, sanction, or authority (as the case may require) of the vestries of the majority of such parishes."

Cur. adv. vult.

The judgment of the Court was now delivered by

CROMPTON, J.—In this case, which was argued in the course of the last Term before the Lord Chief Justice, my brother Mellor and myself, two points were made for the defendants. The first was that the Burial Board for the parish as to ecclesiastical purposes was ill constituted; and secondly, that the mode of taxation adopted was wrong.

It was said on the first head that the hamlet of Coleshill was a place maintaining its own poor, and therefore, by the interpretation clause of the 15 & 16 Vict. c. 85, was a parish within that Act for the purpose of having a Burial Board of its own. No doubt it was by the provisions of that Act in the same situation as a parish, but we think that the real question was whether the case did not fall within the 11th section of the 18 & 19 Vict. c. 128, a statute passed to amend, and which is to be read as part of, the former Acts.

The object of the provision in the amending statute was to enable a parish consisting of different parts united together for ecclesiastical objects to constitute a district for the purpose of appointing a Burial Board.

*The facts in the present case appear to us clearly to make out such community and connection as is defined in the beginning of the 11th section; and the latter part of the section enables the vestry or meeting in the nature of a vestry for the whole district to appoint a Burial Board, and gives the whole powers of the preceding enactments for providing a burial ground for the common use of such parishes or places so united as if such parishes or places had been a parish separately maintaining its own poor. In other words, it brings the whole district into the class or category of places as defined by the 15 & 16 Vict. c. 85, and by that statute having the power to appoint a Burial Board for the one district by the vote of the one vestry or meeting in the nature of a vestry. Here there was an actual vestry for ecclesiastical purposes, so that there is no occasion to resort to the

provision made for the cases in which a meeting in the nature of a vestry is to have the power.

The Burial Board in question appearing to have been regularly constituted by the vote of the vestry for the whole district, we think that it was well constituted under the provisions of the 18 & 19 Vict. c. 128, s. 11.

It should be remembered that the object and effect of these provisions is to make the whole district one body, acting by one vestry for the purpose of establishing a Burial Board, not to create two distinct bodies having power by virtue of the 15 & 16 Vict. c. 85, s. 28, to concur in providing one Burial Board in such manner as they shall mutually agree, and to agree as to the proportions in which each parish shall be chargeable. This distinction is important with respect to the question secondly raised before us as to the mode of taxation.

*It was pressed upon us principally that the 11th section of the 18 & 19 Vict. c. 128, must be read with reference to the [*863 23d section of the 15 & 16 Vict. c. 85; and therefore that the Board ought to have fixed one definite proportion in the contract for the amount to which each of the two places was to be chargeable in future, and which was never to be changed.

We do not concur in this view of the enactment.

The provisions in the 23d section of the 15 & 16 Vict. c. 85, are applicable when the two parishes or places maintaining their own poor, acting by their two vestries, are to consider whether they will have a joint Burial Board or not; and they are therefore properly directed to consider in what manner not inconsistent with the Act the burial ground shall be provided, and in what proportions they shall each be chargeable, a most important element in their consideration of the question whether they shall unite or not. They are each to appoint a Burial Board, who are to act together as a joint Burial Board, and to be incorporated by the name of "The Burial Board for the parishes of _____," whilst the ordinary Burial Board is to be incorporated by the name of "The Burial Board for the parish of _____."

It seems to us that the effect of the 11th section of the 18 & 19 Vict. c. 128, is to bring the case within the class of cases by which a parish, as defined by the 15 & 16 Vict. c. 85, is to form a district by itself; and not within the class referred to in the 23d section of that Act, where two or more parishes are to agree. The powers are to be exercised by one body, and not by two bodies agreeing before the constitution of the Board on what terms and in what proportions they shall unite. The 11th section of the later Act expressly says that the inhabitants are *to act by the one vestry or meeting in the [*864 nature of a vestry, and are to be in the same situation as if the district constituted one parish separately maintaining its own poor; in effect that they are to fall within the class of cases in which a parish, i. e. by the definition, every place maintaining its own poor, is to be a body to constitute by one vestry one Burial Board, and not within the class contemplated in the 23d section of the 15 & 16 Vict. c. 85, by which the two parishes are kept distinct, and elect two separate Boards, who are to act jointly.

Under the 23d section of the 15 & 16 Vict. c. 85, the proportion

was clearly *to remain* the same as between the parishes, but that does not appear to have been contemplated by the 11th section of the later Act, which gives directions as to the apportioning the expenses with reference to the rateable value of the property.

There is not to be one proportion fixed for ever according to the agreement of the parties, but the expenses are to be borne by the several parishes or places, and shall be apportioned among them by the Board in proportion to the value of the property in such several parishes or places as are rated to the relief of the poor. This, we think, may well be construed to mean that the proportion shall be according to the rateable value *from time to time* when it may become necessary to raise the rates, and this seems to us a more natural construction than to hold that the rateable value at the establishment of the Board is to be binding for ever. The proportion is to depend on the value as rated to the relief of the poor, and it can hardly mean that for all future time the rates for the year of the establishing the Board are to be referred to. It certainly seems a much more reasonable provision that the burden should *follow the rateable *865] value from time to time as the words seem to import. It appears to be more just that the places should contribute as the population varies and the rateable value falls and rises; and this is in effect the same provision as is made for the common case of one parish by the earlier clauses of the Act.

The Act saying that the Burial Board, as we think *from time to time*, are to apportion the expenses to be borne by the two places in proportion to the value of the property in each as rated to the relief of the poor, the mode adopted seems to us to be right, as the Board has so apportioned the necessary sum, and then the machinery of the earlier Act as to giving the certificate and requiring the overseers to pay the money seems to apply.

It was said indeed by Mr. Lush that there were to be two modes of taxation, and that the sums to meet the expenses of providing or buying a burial ground and of paying the mortgage moneys, though falling upon the rates, were to be raised in a different manner from the ordinary expenses of maintaining, &c., the burial ground. We see however no distinct machinery given for this purpose, and we do not see why all the expenses, whether to meet the necessary expenditure for maintaining the burial ground, or for the purpose of meeting the interest on money borrowed, should not be raised by one tax, a much more convenient course than if two distinct taxations were to be necessary every year, the one for ordinary and the other for extraordinary expenditure, where both are alike to be paid out of the rates.

Another objection was made by Mr. Lush, that the mortgage-deed was defective in charging the sum borrowed upon the future rates of *866] the one part of the parish *and also upon the future rates of the other part of the parish. If the view we have taken be correct, that the expenses are to be defrayed from the rates of the two places in proportion to the rateable property in each *from time to time*, this would seem correct; as it must be construed to mean, and its legal effect would be, to charge it on the rates of the parishes in the proportion to be ascertained from time to time according to the rateable value of the property in each.

Upon the whole, therefore, we are disposed to think that the constitution of the Board and the mode of taxation adopted in this case, carry out in the way that seems most feasible the object of the provisions of the Act; but we cannot help observing that it is impossible to come to anything like a decision which is perfectly satisfactory to our own minds, amidst such confusion as exists in the provisions of the different Burial Acts which have been referred to in the course of the argument.

For the reasons we have given our judgment is for the Crown.

Judgment for the Crown.

*MEMORANDUM.

[*867

John Mellor, Esq., one of the Justices of this Court, received the honour of knighthood by letters patent under the Great Seal.

END OF TRINITY TERM.

ADDITIONAL CASES

FROM

CONTEMPORANEOUS REPORTS.

IN THE HOUSE OF LORDS.

THE PROPRIETORS, &c., OF THE GREAT WESTERN RAILWAY CO., Plaintiffs in Error; and JOHN BENNETT, Defendant in Error. *Feb. 11, 18; March 18, 1867.(a)*

Railway Clauses Act—Mines—Subjacent and adjacent Support.

By the effect of the 77th, 78th, and 79th sections of the Railways Clauses Consolidation Act, 1845, a railway company on purchasing, under that statute, land for the purposes of the railway, does not become entitled to the mines under the land; the owner may work them after notice duly given; and if, after such notice, the company, though desiring to prevent the working, does not give compensation for the minerals, the owner may work them up to and under the railway, working them in a "proper manner" and "according to the usual manner of working such mines in the district." The company cannot, under this statutory purchase, claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support, the statute having created a specific law for such matters, by which alone the rights of the company and the mine owner are regulated.

The Dudley Canal Company v. Grasebrook, 1 B. & Ad. 59, approved.

THIS was a proceeding on error on a judgment in the Court of Queen's Bench, which had been affirmed by the Exchequer Chamber.^(b)

The Shrewsbury and Birmingham Railway Company, under the powers of the Shrewsbury and Birmingham Railway Act, 1846, had acquired in fee simple certain lands lying in Wombridge, in the county of Salop, for the purpose of constructing the railway. That Act incorporated the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845. These lands, and the Birmingham and Shrewsbury Railway itself, afterwards came, under the 17 & 18 Vict. c. ccxxii., to be vested in the plaintiffs in error, who constituted the Great Western Railway Company.

The original conveyance, dated the 11th of September, 1849, was

(a) Law Rep. 2 H. L. (Eng. & Ir. App.) 27.

(b) The case was not reported in the Courts below, as judgment was given upon the authority of a previous case of Fletcher v. The Great Western Railway Co.

made by the then owners of the lands, who were also owners of the mines and minerals lying under the same, and conveyed to the Shrewsbury Company, for the purposes of the railway, in the form given in the schedule to the Lands Clauses Consolidation Act, 1845, the lands, "excepting and always reserved, &c., the mines and minerals in and under the said hereditaments and premises, with all the necessary powers and privileges for getting and working the same." The railway and works were then constructed on the lands, partly on the surface, and partly in a tunnel. In the year 1856, Bennett, the Defendant in error, purchased the reserved mines and minerals. On the 9th of June, 1856, he gave to the plaintiffs in error, under the 78th section of the Railways Clauses Consolidation Act, 1845, notice of his intention, within thirty days after the date of the notice, to work the mines and minerals lying under the railway and tunnel, and within forty yards therefrom, unless they stated their willingness to treat for compensation. On the 9th of July, 1856, the plaintiffs in error gave Bennett notice of their willingness so to treat with respect to the mines and minerals lying under so much of the lands as were coloured pink in a plan annexed. These lands lay under two ends of the line of railway and a tunnel connecting them, and on both sides of the same.

On the 1st of December, 1857, Bennett gave to the plaintiffs in error notice that he was also the owner of other mines and minerals which lay under another portion of the lands (coloured blue in the plan), and situate just outside the line of the other lands, which he would, by severance, be prevented from working, and for which he also required compensation; and that he was desirous that the amount of his claim, if not agreed to, should be settled by arbitration in the manner provided in the Railways Clauses Consolidation Act, 1845. This claim did come under arbitration, and on the 28th of October, 1858, an award was made containing the following special finding: "Supposing that the said John Bennett had not been interrupted and prevented from working and getting the said mines and minerals, and had the right to work and get the whole as against the company as owners of the surface, then I find the whole of the said mines and minerals, for which compensation is hereby awarded, could properly have been worked and gotten in the manner proper and necessary for the beneficial working of the same, and according to the usual manner of working such mines and minerals in the district within which the same are situated. But I also find that no greater portion than one-third of the said mines and minerals could properly, and in such manner as aforesaid, have been so worked and gotten, if in working and getting the same a sufficient portion of the said mines and minerals was to be left to give reasonable support to the said surface land, and to prevent any damage by the sinking thereof; and I also find that the same amount of support would have been necessary for the surface land if the said railway and tunnel had not existed." The award farther declared that, in respect of the minerals lying under the land coloured pink, the plaintiffs in error were to pay to Bennett, if he would have been entitled to work out the whole of them, the sum of 8649*l.* 10*s.*, but that if he would have been bound to leave reasonable support to the surface, the sum of 1085*l.* 3*s.* 8*d.*; that Bennett

was entitled to compensation for the additional loss and damage which he had incurred in respect of the other portion of the mines and minerals which could not be worked by reason of severance; and that the farther amount to which Bennett was entitled, if he would have been entitled to work out the whole of the said last-mentioned portions of mines and minerals, was 1042*l.* 7*s.* 2*d.*; but that if Bennett was bound to leave reasonable support, then the amount of compensation in respect of the last-mentioned mines and minerals was 140*l.* 16*s.* 7*d.*

An action was brought on this award. A special case was stated by consent, and in Michaelmas Term, 1862, the Court of Queen's Bench gave judgment in favour of Bennett for the two larger amounts. This judgment was given on the authority of *Fletcher v. Great Western Railway Company*, 4 H. & N. 242 (affirmed 5 Ib. 689).^(a) In Easter Term, 1863, the judgment was affirmed in the Exchequer Chamber. The case was then brought up to this House.

Manisty, Q. C., and *Field*, Q. C., for the appellants.—The question raised is, whether, having regard to the 77th and two following sections of the Railways Clauses Consolidation Act, 1845,^(b) and to the deed by which the surface land was conveyed to the appellants, the defendant in error may work the mines and take the coal, leaving no support to the surface, or whether, if they had not availed

• (a) The following is the marginal note of that case:—"A railway company having, by agreement with the owner, purchased land for the purpose of making the railway, and having taken a conveyance in the form given by the Lands Clauses Consolidation Act, 1845, Schedule A, and not being willing to purchase the minerals after notice of the owner's intention to work them, pursuant to sect. 78 of the Railways Clauses Consolidation Act, 1846, is not entitled to the adjacent or subjacent support of the minerals; but the owner is entitled to get them, notwithstanding that the getting of such minerals would cause the surface to subside:—Held, accordingly, that where, under such circumstances, the company had given notice that the working of the mines was likely to damage the works of the company, the owner of the minerals was entitled to recover compensation which had been assessed under the said 78th section."

(b) 8 & 9 Vict. c. 20 (Railways Clauses Consolidation Act, 1845).

Sect. 77. "The company shall not be entitled to any mines of coal, &c., under any land purchased, except only such parts thereof as shall be necessary to be dug, or carried away, or used in the construction of the works, unless the same shall have been expressly purchased: and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

Sect. 78. "If the owner, &c., of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distances, or, when no distance shall be prescribed, forty yards therefrom, be desirous of working the same, he shall give to the company a notice in writing of his intention so to do thirty days before the commencement of working, and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines, or any part thereof, to such owner, &c., then he shall not work to get the same; and if the company and such owner, &c., do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

Sect. 79. "If before the expiration of such thirty days the company do not state their willingness to treat with such owner, &c., for the payment of such compensation, it shall be lawful for him to work the said mines, or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate: and if any damage or obstruction be occasioned to the railway or works by improper working of such mines, the same shall be forthwith repaired or removed, as the case may require, and such damage made good by the owner, &c., at his own expense," and if that is not forthwith done by the owner the company may do it, and recover the amount by action.

themselves of the powers in the general Act, he could have removed all the coals under the railway and for forty yards on each side of it, leaving no support whatever; and finally, whether he was not bound, at all events, to leave support to the surface. In substance the point to be determined is raised by the award, and is, what is the effect or the consequence of a company availing itself of the statutes, and making a purchase of lands under their provisions?

Bennett can only claim to be paid for so much of the coal as he might take away without diminishing the reasonable support of the surface. To that the appellants are entitled as purchasers of the surface. They would be so entitled as purchasers in the ordinary way; they are even more entitled under the provisions of the Railway Acts. He has, in the price of the land, got compensation for the surface, and having sold the surface, he is bound by law not to work his mines so as to withdraw from the surface sufficient reasonable support.

If the case had stood on the deed alone, he would have been in the condition of an ordinary owner of mines lying under the land, having reserved a power of working them. That power would have been a power reasonably to work with reference to the safety of the surface.

As there might be more danger where a railway ran over the surface than in an ordinary case, the Legislature interfered to compel an owner of the mines to give to the railway directors notice of his intention to work, either under the railway itself, or within forty yards of it; and if the company prevented his working, the company was to pay him compensation for that coal which, but for the notice, he might have taken away. But he is not entitled to be paid for coal which, even without any notice, he could not have taken away, because its removal would have been the removal of reasonable support to the surface.

The Caledonian Railway *v.* Sprot, 2 Macq. Sc. Ap. 449, laid down that doctrine in the case of a private conveyance, and is, therefore, directly applicable here. [LORD WESTBURY.—The conveyance under the statute excepts the mines and minerals; does that mean all the mines and minerals, or only so much of them as can be got with due regard to the safety or advantage of the railway company?] It has the latter meaning, as is shown by the case of Elliot *v.* The North Eastern Railway Company, 10 H. L. C. 333, which decided that a conveyance granting land for a special purpose, must be construed as conveying all the rights necessarily incident to the due execution of that purpose. In the former of these cases, there was a private Act (7 Geo. 4, c. ciii.), by which a company had the right to take lands compulsorily, they were taken, but leave was reserved to work the mines, but the Act prohibited the proprietor who sold the surface from working the mines to the disadvantage of the company. [THE LORD CHANCELLOR.—In that case, the conveyance was dated ten years before the Scotch Railways Act, 1845 (8 & 9 Vict. c. 19), passed, and Lord Chancellor Cranworth thought that that Act did not apply.] But he recognised on any sale or grant, however made, the right of the purchaser of the surface to subjacent and adjacent support, and the positive obligation to leave it, even though there was an absolute reservation of mines and minerals. In Elliot *v.* The North Eastern

Railway Company, Lord Chelmsford remarked, that a company must pay for extraordinary support, which itself showed that he thought, as Lord Cranworth had said, in *The Caledonian Railway v. Sprot*, that the company, on an ordinary purchase of land, would be entitled to ordinary support and he also declared that whether a sale was voluntary or compulsory made no difference, for every grant carried with it the ordinary incidents of a grant, and he applied those incidents in that case, though he considered the sale to have been made under the compulsory powers of the Act of Parliament. There is nothing in this case which excludes the operation of this ordinary rule. It is perfectly clear that the purchaser of land without anything to exclude the operation of the common law, would be entitled to reasonable support of the surface: *Harris v. Ryding*, 5 M. & W. 60; though there the reservation of the mines, and of the right and means to work them, was in very general and extensive terms. *Smart v. Morton*, 5 E. & B. 30, *Roberts v. Haines*, 6 E. & B. 643, 7 E. & B. 625, *Humphries v. Brogden*, 12 Q. B. 739, show that the language of deeds before the Act was at least as strong in favour of the owner of the mines, as the language of the sections in the statute, and, consequently, that the sections could not be construed as affecting, certainly not as diminishing, the common-law right to support on the surface. And *Backhouse v. Bonomi*, 9 H. L. C. 503, establishes that it is the duty of a mine owner, even where he has the clearest right to work the mine, to leave sufficient support to the surface. In that way, those cases may fairly be taken as interpreters of the statute.

But there certainly was a difference with respect to one matter, and that difference is in favour of the appellants. The common law required that reasonable support should be afforded, but there was no precise limit fixed within which that support must be given. Now railway works might require more support than works of an ordinary kind, and so the 78th section gave a distance of forty yards within which mines must not be worked, except after certain notices had been given. But, though that section gave a company the power to treat for the purchase of the right to work the mines, there was no power in a company to compel the sale of that right. Yet it never could have been the intention of the Legislature to expose railways to greater danger than houses built in the ordinary way on the surface of land covering mines. The section must, therefore, be construed with reference to the cases previously decided upon common-law rights, and then it is obvious that that which the common law gave the statute had not taken away.

Mellish, Q. C., and *Hannen* (*Crompton* was with them), for the respondent.—The real question here, is the construction of the three sections of the Railways Clauses Act. The effect attributed to an ordinary conveyance of the surface may be admitted, and, according to the case of *The Caledonian Railway v. Sprot*, 2 Macq. Sc. Ap. Cas. 449, that may apply in the case of a conveyance to a railway as much as to any other. But the Courts have distinguished between the two classes of cases, and have held that the effect of the Railways Clauses Act is to postpone the compensation to the mine owner till he comes within a certain distance of the railway. The object was fair to both parties. The owner was not to lose his property if there were mines; the rail-

way company was not to pay for them if they were not found to exist, or if they were not worked or about to be worked. Here they did exist, and were intended to be worked. A large quantity of coal was required for the support of the railway works. It cannot be contended that the mere sale of the surface bound the mine owner to make such a sacrifice of the coal lying under it, without proper compensation. A part might be got here without injury, the mine owner was entitled to get that part, or if prevented from getting it, must be compensated for it. He was also entitled to get that part, the getting of which might, without improper working, be considered injurious to the works of the railway. This latter was to be subject of notice and compensation. In *The Caledonian Railway Company v. Sprot*, the whole of the compensation was really paid at the time of making the purchase; it was not so here. There is no pretence for saying that so much of the minerals as are under or near the railway were purchased at the time the surface was purchased; yet such is, in effect, the argument on the other side. That is contrary to common sense, and to the interpretation put by the Courts on the sections of the statute.

What was the rule regulating the right to get the minerals before this Railways Clauses Act was passed? In *The Dudley Canal Company v. Grazebrook*, 1 B. & Ad. 59, there was a special proviso that in working the mine no injury was to be done to the navigation. Those words were stronger than any to be found in these Acts, but the Court said that they meant no unnecessary, no extraordinary damage. [THE LORD CHANCELLOR.—But the appellants say that they have got the right to reasonable support, that by law they are entitled to it, and that the respondent has no right to take it away.] But the answer to that general allegation is the other general allegation, that the owner is always entitled to work his mines in the ordinary and usual mode; and that is all that is proposed to be done here. The practical result of overruling those decisions, which have established his general right, would be to give to railway companies the means, by a mere purchase of the surface, to possess themselves of the most valuable minerals without paying for them at all.

The provisions of the statute which require notice to the company of the intention to work the mine, and which give the company the right to inspect the working, so as to see whether any damage is likely to arise, show distinctly that in purchasing the surface the company obtained the surface and nothing more, and if it desired to obtain more must proceed under the 78th and 79th sections, and must compensate the mine owner for the additional rights taken from him. If the right to get the minerals was already gone, there was no necessity for the insertion of these provisions. Nor was there any need to guard against the improper working of the mines if the owner was not entitled to work them at all. The use of the word "proper" shows that the mine owner was entitled to work the mines, and pointed out the mode and manner in which he was to work them. The 78th and 79th sections do but render effectual the exception contained in the 77th section, which would otherwise be illusory and absurd.

The case of *Fletcher v. The Great Western Railway*, 4 H. & N. 242, 5 H. & N. 689, was properly decided, and is directly in point here. There it was insisted that the company was to be protected against damage from any working whatever. The special case found that the working would have taken away the support, and the question was, whether the mine owner was, under these circumstances, entitled to compensation for what he would lose if prevented from working the mine. It was held that he was, and that decision was, after full argument on error, confirmed in the Exchequer Chamber.

The case of *The Caledonian Railway Company v. Sprot*, 2 Macq. Sc. Ap. 449, was on an Act of Parliament entirely different from the present, and is inapplicable here. *Elliot v. The North Eastern Railway Company*, 10 H. L. C. 833, is more complicated, but the same observation applies there.

Here, as the grant of the surface is by the statute, and the conveyance is expressly made subject to the rights of the owner of the mines, who is authorized to work them by all proper and necessary means, the simple question here is one of the construction of the words of the 79th section. The word "improper" was meant only to protect a railway company against the wanton exercise of the rights of an owner of mines whose rights were thus reserved. If the work is properly conducted he is entitled to work the mines, or to compensation if the company desires him to abstain from working them.

This question has lately, and since the case of *Fletcher v. The Great Western Railway Company*, been under consideration in the Court of Chancery, and a decision has been pronounced upon it by Vice-Chancellor Wood in the case of *The North Western Railway Company v. Ackroyd*, 81 L. J. Ch. 588, where it was held that the owner of land granting to a railway company the right to make and maintain a tunnel, was in the same position with respect to his right to work mines, under the sections of the Railways Clauses Act, as if the land had been purchased, and under them he was held entitled to work the mines, and a bill filed to require the owner of the mines to leave sufficient subjacent and adjacent support was dismissed. In the case of *The Wyrley Canal Company v. Bradley*, 7 East 368, a Canal Act, like the Railways Clauses Act, excluded the company from purchasing mines under the canal, and reserved to the owner the power to work them after giving notice, the company having power to stop the working on paying compensation. It was there held that the right to work was left as before the Act if, after notice given, the company did not purchase the owner's rights. The case of *The Dudley Canal Company v. Grazebrook*, 1 B. & Ad. 59, followed, and then came *The Stourbridge Canal Company v. The Earl of Dudley*, 3 E. & E. 409, where clauses similar to these existed, and in both it was held that the owner of the mines was entitled to work them in the usual and ordinary manner, though damage might ensue from his so doing, if, after notice, compensation were not made to him. These authorities are decisive as to the construction which ought to be put on the sections of the statute in the present case.

Manisty replied.

March 18. THE LORD CHANCELLOR (LORD CHELMSFORD).—My Lords, this writ of error is virtually brought upon the decision of the Court of Exchequer and the Court of Exchequer Chamber in the case of *Fletcher v. The Great Western Railway Company*, as upon the authority of that case the present one was decided without argument.

The question to be determined is, whether the plaintiffs in error having purchased the lands of the defendant in error for the purpose of constructing a portion of their railway, and the conveyance to them containing an exception of "the mines and minerals in and under the hereditaments and premises, with all the necessary powers and privileges for getting and working the same," the plaintiffs in error are entitled to sufficient support to the railway from the portion of the mines and minerals lying under or adjoining the same, without being bound to make compensation to the defendant in error.

The question depends entirely upon the clauses contained in the Railways Clauses Consolidation Act, 1845, under the heading, "with respect to mines lying under or near the railway," beginning with sect. 77. This will at once render inapplicable the two cases of *The Caledonian Railway Company v. Sprot*, 2 Macq. Sc. Ap. 449, and *Elliot v. The Directors of the North Eastern Railway Company*, 10 H. L. C. 333, decided in this House, neither of which decisions turned upon the sections in question.

By the 77th section of the Railways Clauses Consolidation Act, a railway company is not "to be entitled to any mines of coal, iron-stone, slate, or other minerals, under any lands purchased by them, except only such parts thereof as shall be necessary to be dug, or carried away, or used in the construction of the works, unless the same shall have been expressly purchased." The provision contained in this section is extremely beneficial to railway companies. They are not to have any mines or minerals, that is (any part of the mines or minerals) under the land purchased by them; but they may secure sufficient support to the railway by purchasing it from the owner of the mines, or, if they think it likely that the mines under the railway may not be worked for an indefinite period, they may postpone the purchase until the necessity for it arises.

That this section reserves to the mine owner all the minerals, however near they may be to the surface, unless the company chooses to purchase them, appears very clearly from the exception of "the parts necessary to be dug, or carried away, or used in the construction of the company's works," as these will, of course, be the minerals lying nearest to the surface. But if the company desires to postpone the purchase of the mines until it is known that they are to be worked, the company is enabled to do so, with perfect safety, from the protection afforded by the 78th section, which compels the mine owner whose mines lie under the railway, or within a certain distance of it, who is desirous of working the same, "to give thirty days' notice of his intention, and the company may then cause the mines to be inspected, and if it appear that the working of the mines is likely to damage the railway, and if the company be willing to make compensation for the mines to the owner, he shall not work or get the same." This section appears to me to leave the mine owner to work his mines

exactly as he would if the surface belonged to him, unless the railway company chooses to prevent him by expressing willingness to make him compensation. If the company should not, within thirty days, state the willingness to treat with the mine owner for the payment of compensation, he is, by the 79th section, left at liberty to work the mines, "so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district." But to guard railway companies, under these circumstances, against any unfair mode of working the mines to their prejudice, it is provided by the same section that "if any damage or obstruction be occasioned to the railway or works by improper working of such mines, the owner shall repair and make it good." And the 83d section gives the company power "to ascertain whether the mines are being worked, or have been worked, so as to damage the railway or works."

The mine owner, therefore, may work his mines in a manner beneficial to himself, in order to win the largest quantity of minerals that the mine will yield, but so as not to depart from the usual manner of working in the district.

As to the obligation imposed upon the mine owner to make good any damage occasioned by his improper working of the mines, if the argument of the plaintiffs in error is correct, that the company is, from the first, entitled to a sufficient support to the railway from the mines, every working which diminishes that support must be improper. It then becomes difficult to understand how any case can arise for the application of the provisions of the 78th section. If the working of the mines and minerals is likely to produce damage to the works of the railway, it must be by taking away the support to which the company is supposed to be entitled; but then, instead of the company being required to make compensation to prevent the owner from working at all, any working would be improper, and the owner would be compellable, under the 79th section, to make good, at his own expense, any damage done.

The case of *The Dudley Canal Company v. Grazebrook*, 1 B. & Ad. 59, appears to me to be a strong authority in favour of the construction of the sections of the Railways Clauses Consolidation Act which I have adopted.

I am, therefore, of opinion that the judgment of the Court below ought to be affirmed.

LORD CRANWORTH.—My Lords, I have very little to add to what has fallen from my noble and learned friend. Independently of the statute, I think the contention of the company would have been unanswerable. I should be extremely sorry if this case should at all bring into doubt the doctrine which was enunciated and acted upon by this House in the case of *The Caledonian Railway Company v. Sprot*, which doctrine is this:—that if I sell my land for the purpose of a railway being made upon it, I impliedly sell all necessary support, both subjacent and adjacent, that is required for the purpose of supporting that railway. In the case of *The Caledonian Railway Company v. Sprot*, the conclusion at which this House arrived was, that although the sale of the land was one which might have been compelled, probably, under the statutes then in force (not the present

statute, because it was before the passing of the statute now in force), yet, in truth, it was a mere contract between Mr. Sprot and the company, and must be dealt with just as if no statute existed. But the difficulties which had arisen upon this subject were, I presume, what gave rise to these provisions of the Railways Clauses Act which are now under discussion.

It was obviously the intention of the Legislature, in making these provisions, to create a new code as to the relation between mine owners and railway companies, where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered; nothing but the surface. That being so, justice obviously requires that when the mine owner thinks it beneficial to him to work his mines, and proceeds to do so, he should be just in the same position as if he had never sold any part of the surface at all. If he had not compulsorily parted with the surface, he might have worked his mines, sinking his shaft from the very surface down to the very bottom of the mine. The object of the statute was that, for the purpose of the railway, the company was to take (and it was a very beneficial provision for the company), that, and that only, which is necessary for the purpose of the railway; and that all the rest should be left to be dealt with, whenever the time for working the mine should arrive. It is plain to me, upon the construction of that clause of the statute, that that was the intention of the Legislature; and that intention is fully carried into effect by giving to the mine owner, in this case the respondent, Mr. Bennett, that which the Court below has given to him, namely, the full right in all the mines which he worked, just as if he had not sold the surface.

I think, therefore, the judgment below is perfectly right, and that, consequently, judgment ought to be given for the defendant in error.

LORD WESTBURY.—My Lords, this case presents no difficulty when the true relation between the railway company and the mine owner, as settled by the statute, is once ascertained. A railway company is under no obligation, I should rather say, is under a disability, to purchase mines unopened, mines lying beneath the land required for the railway. They are absolutely reserved and excepted out of the conveyance to be made by the landowner to the company. The chief argument for the present appellants, embodied in their Second Reason, that the conveyance grants to the company as much as is requisite for the support of the railway, is entirely taken away by the 77th section of the statute. In that section it is positively declared that "all such mines, excepting as aforesaid"—that is, except the small portion of minerals which may be disturbed or brought to bank by the operation of making the railway—"all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby." In the face of these words there is no room for the ordinary implication which applies to a

common grant, namely, that it extends by implication to all that, though not named, which is necessary for the support or enjoyment of the thing granted.

Then what relation remains between the railway company and the mine owner? It is defined by the statute. Although the mines *in solido* are, without any exception, reserved to the mine owner, he is not at liberty to win them, or to proceed to get them without notice to the railway company. That notice expires after a month. During that month the railway company is under an obligation to ascertain whether it may be requisite for the support of the railway, to purchase any part of the subjacent minerals. If the company should not think it requisite, the mine owner is left under no other obligation than that he is to win the mines in a proper manner; and if there is a custom of the country it must be done according to that custom; and the railway company is armed with authority to inspect the working from time to time, in order to ascertain whether any damage is likely to ensue, or whether any proceeding of the mine owner is inconsistent with the ordinary beneficial manner of winning the minerals. The relation, therefore, between the railway company and the mine owner is one so clearly defined, so useful to the railway company, and at the same time so fair and just to the mine owner, that one is astonished that any argument could have been raised upon the ordinary implication applicable to a grant, which is so entirely excluded by the express enactment of the statute, and also by the accompanying provisions that define, beyond the possibility of mistake, the true relation which, after the land has been conveyed to the railway company, continues to exist between the company and the mine owner. There can be no doubt that the decision of the Court below is right; and I entirely concur with my noble and learned friends, that the judgment must be affirmed.

Judgment affirmed.

Lords' Journals, 18th March, 1867.

Attorneys for the plaintiffs in error: *Maples & Teesdale*.

Attorneys for the defendants in error: *Hollings, Sharpe & Ulk-thorne*.

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2. Where an action is brought on a judgment obtained in a foreign Court, the pendency of an appeal in the foreign Court against that judgment is no bar to the action; although it may afford ground for the equitable interposition of the English Court in which the action is brought to prevent the possible abuse of its process, and on proper terms to stay execution.

Id.

3. Concessum, that the judgment of a foreign Court having jurisdiction over the subject-matter cannot be questioned here, on the ground that the foreign Court has mistaken the law of its own country, or has come, on the evidence, to an erroneous conclusion as to the facts.

4. In an action on a judgment obtained by the plaintiff against the defendant in the Supreme Court of New York, the defendant pleaded that the judgment was erroneous according to the law of New York, and was liable to be reversed, and that he was prosecuting proceedings in appeal, which were then pending; and he set out the record of the proceedings in the original suit there, by which it appeared that the cause had been referred by order of the Court, not to a private arbitrator selected by the parties, but to an officer of the Court directed to ascertain the facts, who found certain facts, with a certain conclusion of law from them, and judgment was given accordingly in favour of the plaintiff; although the same conclusion would not have followed by the English

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BURIAL ACTS.

By stat. 15 & 16 Vict. c. 85, ss. 10, 11, extended to the whole of England by stat 16 & 17 Vict. c. 134, the vestry of any parish, having resolved that a burial ground shall be provided for the parish, shall appoint a Burial Board. By sect. 52 "Parish" shall mean every place having separate overseers of the poor, and sepa-

rately maintaining its own poor." Mandamus to the overseers of the parish of W., reciting that a Burial Board had been appointed for that parish, commanded them to pay out of the poor rates of the parish the expenses incurred by that Board. Return: that, in 1840, before the constitution of the Burial Board for the parish of W., that parish had been, under stat. 58 G. 3, c. 45, divided into three separate parishes for all ecclesiastical purposes; but did not show that either of the new parishes had appointed a Burial Board under stat. 20 & 21 Vict. c. 81, s. 5. Held no answer. *The Queen v. Overseers of Walcott,* 565

II. Stat. 20 & 21 Vict. c. 81, s. 5, enacts that the vestry of any parish, new parish, township, or other district not separately maintaining its own poor, and which has no separate burial ground, may appoint a Burial Board; and such vestry, and the Burial Board appointed by it, shall exercise and have all the powers which they might have exercised and had if such parish, new parish, township or district had had a separate burial ground before stat. 18 & 19 Vict. c. 128; provided that all the powers of any other vestry and Burial Board, if any, shall then cease and determine, so far as relates to such parish, new parish, township or district. A mandamus, reciting that the parish of W. had been divided into three parishes for ecclesiastical purposes, and that the vestry of the parish of St. S., being one of them, had appointed a Burial Board, and resolved that a burial ground should be provided, and that the Burial Board should be authorized to incur expenses for that purpose, and that the Burial Board had certified that 49*l. 5s. 9d.* was required for defraying expenses incurred, and directed the overseers of the parish of W. to pay such sum to the clerk of the Burial Board; commanded the overseers to pay or raise the said sum according to the certificate. Return: that, before the meeting of the vestry of St. S. for determining whether a burial ground should be provided for that parish, a Burial Board was appointed for the original parish of W. Held no answer; as the appointment of a Burial Board for the original parish did not prevent the ecclesiastical parish of St. S. from appointing a separate Burial Board under stat. 20 & 21 Vict. c. 81, s. 5. *The Queen v. Overseers of Walcot St. Swithin,* 571

III. Stat. 18 & 19 Vict. c. 128, s. 18, which enacts that in every case in which any order in council is issued for the discontinuance of burials in any churchyard or burial ground, the Burial Board or Churchwardens shall maintain such churchyard or burial ground of any parish in decent order, and also do the necessary repair of the walls and other fences thereof, and the expenses shall be repaid by the overseers, upon the certificate of the Burial Board or Churchwardens, out of the poor rate of the par-

ish or place in which such churchyard or burial ground is situate, unless there shall be some other fund legally chargeable with such expenses, does not apply to a burial ground which is not a burial ground of any parish, but is the property of private persons: affirming the judgment of the Queen's Bench. *The Queen v. Burial Board of St. John, Westgate,* 708

IV. Where two parishes or places each maintaining its own poor, are united together for ecclesiastical purposes, a Burial Board for the whole district, appointed by the vote of the vestry, or meeting in the nature of a vestry, is properly constituted, by virtue of stat. 18 & 19 Vict. c. 128, read in connection with stat. 15 & 16 Vict. c. 85: although this would have been otherwise under the 15 & 16 Vict. c. 85. *The Queen v. Overseers of Colleshill,* 825

V. In such a case, in the contract for providing for the expenses of the burial ground, the Burial Board ought to fix the sum payable once for all;—not to fix one definite proportion for the amount to which each of the two parishes or places is to be chargeable in future: although this also would have been otherwise under the former Act. *Id.*

VI. In such a case, where money is borrowed by the Burial Board towards the expenses of providing the burial ground, the deed should charge the sum borrowed upon the future rates of the one part of the parish, and also upon the future rates of the other part. *Id.*

BURIAL BOARDS.

See BURIAL ACTS.

CANAL TRAFFIC ACT.

See RAILWAY COMPANY, I.

CAPIAS.

The defendant being about to leave this country for New Zealand, was arrested on a capias under stat. 1 & 2 Vict. c. 110, s. 3. The plaintiff had proved his debt in Scotland; and a warrant of protection had been granted to the defendant for a limited period, which had not elapsed when he was arrested: held, that the defendant was not entitled to be discharged. *Dutton v. Halley,* 748

CARRIAGE OF ANIMALS.

See RAILWAY COMPANY, I.

CARRIER.

See GUNPOWDER. RAILWAY COMPANY.

CHARTER-PARTY.

Declaration stated that, by charter-party between the plaintiffs (owners of the ship P.) and the defendant (a merchant at Liverpool), it was agreed that the ship should receive on board

from the defendant a cargo, and should proceed to C., &c., and there deliver it agreeably to bills of lading; that the defendant should deliver the cargo alongside, and receive it at the port of discharge; that he should pay a lump sum for the hire of the vessel, &c.; and that the master should sign bills of lading. It then alleged that the defendant put up the ship as a general ship; that goods were shipped by him, and eight bills of lading were made out by the shippers and signed by the captain; that it was usual at Liverpool for the shippers of goods by vessels to make out for the captain a correct copy of each bill of lading; that the shippers made out copies of the eight bills of lading and delivered them to the defendant for the captain; that the defendant kept the captain's copies, and the plaintiffs had no copies, nor was it in their power to obtain copies except from the defendant; that it was necessary, as the defendant well knew, for the purposes of the voyage, and to secure the goods from being confiscated abroad, and to enable the plaintiffs to deliver them to the consignees, that a consular manifest should be made out in which an accurate account and description of the goods included in the eight bills of lading should be given; and that it was necessary, as the defendant well knew, for the purpose of making out a complete and accurate consular manifest, that the person employed to make it out should have all the bills of lading or copies thereof: that it was the duty of the defendant as charterer, and under the charter-party, upon request of the owners of the vessel, to hand over the captain's copies of the bills of lading for the purpose of enabling a complete and accurate consular manifest to be made out; and that the defendant was required by the plaintiffs to hand over the copies to K., their agent at Liverpool: but the defendant negligently, improperly and carelessly only handed over to K. copies of six out of the eight bills of lading as and for the whole of the bills of lading relating to the goods: whereby and by reason of such negligence, improper conduct and carelessness, an incomplete and inaccurate consular manifest was made out. Special damage was averred. Held by the Court of Queen's Bench, and affirmed by the Exchequer Chamber, that the declaration was bad for not showing that either by express contract or mercantile usage, or from circumstances, there was a duty on the defendant to hand over the copies of the bills of lading to the plaintiffs. *Dutton v. Powell*.

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CHURCH BUILDING ACTS.

L. Sect. 70 of stat. 58 G. 3, c. 45, which authorizes rates for the "repairs" of district churches, includes rates "to be raised within the district, in like manner as in case of repairs of churches by parishes," for the expenses necessary for the due performance of the offices of the church, as well as for the repairs of the

fabric. *The Queen v. Consistorial Court of London*, 339

II. The parish of L. was divided into three ecclesiastical districts, under sect. 21 of stat. 58 G. 3, c. 45, and subject to the provisions of that and the other Church Building Acts; and one of such districts was assigned to a church called the church of St. B., built under the provisions of those Acts at S., and was called the district parish of St. B., S. A rate was made in form "for and towards the repairs of the district parish church of St. B., S." but in fact for other necessary expenses also, such as lighting and washing, and stationery for registers, &c. Upon a rule for a prohibition, held, that the expenses for which the rate was made were legal. *Id.*

CHURCH RATE.

See RATE, CHURCH.

CHURCHWARDEN.

I. An outgoing churchwarden, whose year of office has expired, continues in office until his successor is not only elected, but has made the declaration substituted for the oath by stat. 5 & 6 W. 4, c. 62, s. 9. *Bray, appellant, Somer, respondent*, 374

II. So held upon an information for not signing the jury lists pursuant to stat. 6 G. 4, c. 50. *Id.*

CLERK.

I. Articled.

1. W. was articled for five years to his father, who was an attorney. After part of the time of service had elapsed the father died, and the articles were shortly afterwards assigned to C., who was also an attorney. In the interval between the death of the father and the assignment of the articles W. attended regularly at the office, and was employed in the business there. The Court refused to allow that interval to be reckoned as part of the five years. *Ex parte Wallis*, 416

2. The applicant had been for several years managing clerk to an attorney, who died, leaving a widow and son, whose service under articles to his father had not then expired. The business was carried on by C., an attorney, for the benefit of the widow and family; and the applicant entered into the service of C. to assist him in managing the business for their benefit until the son should be admitted an attorney. In June, 1858, the applicant was articled to the son, who had been admitted in the same year; and the widow promised to pay the stamp duty as an acknowledgment and recompence for his services. He entered into the articles upon this understanding, and did not discover that the duty had not been paid until after the time allowed by law for stamping and enrolling the articles had expired. In January, 1862, he petitioned the Lords of the

Treasury, who directed the Commissioners of Inland Revenue to stamp the articles, on payment of the duty and penalty under stat. 19 & 20 Vict. c. 81, s. 3, and the articles were stamped accordingly. The Court refused to allow the service under the articles to be computed from the date of their execution; Cockburn, C. J., dubitants. *Ex parte Breden*, 649

II. To Board of Guardians.

1. Under stat. 6 & 7 W. 4, c. 86, s. 7, the clerk to the board of guardians of a union created under stat. 4 & 5 W. 4, c. 76, has no right to be Superintendent Registrar except in the case of the first appointment after stat. 6 & 7 W. 4, c. 86, coming into operation; and on any subsequent vacancy the power of appointment is in the board of guardians. *The Queen v. Acason*, 795

2. W. A., who was clerk to the board of guardians of a union, created under stat. 4 & 5 W. 4, c. 76, and was also Superintendent Registrar appointed by the Registrar-General, under stat. 7 W. 4 & 1 Vict. c. 22, died on January 4th, 1861. On the 17th January, the defendant was appointed Superintendent Registrar by the board of guardians. On the 14th February, the relator was appointed clerk to the board of guardians. Upon information in the nature of quo warranto, Held, that the defendant was duly appointed Superintendent Registrar. *Id.*

III. Of the peace.

By The Municipal Corporation Act, 5 & 6 W. 4, c. 76, s. 103, where a borough has a separate Court of Quarter Sessions, the power of appointing the clerk of the peace is in the Council of the borough; and, by sect. 105, the Court of Quarter Sessions, of which the Recorder is sole Judge, "shall have cognisance of all crimes, offences, and matters whatsoever cognisable by any Court of Quarter Sessions of the peace for counties;" provided, among other things, that no Recorder, by virtue of his office, shall have power "to exercise any of the powers herein specially vested in the Council." Held, that the power of removing the clerk of the peace was in the Recorder. *The Queen v. Hayward*, 585

COLONY, DISCHARGE UNDER LAW OF.

Declaration for money received, money lent, money paid, interest, and on accounts stated. Plea, that the defendant was resident in the Colony of Victoria, and that the debts were contracted within the Colony of Victoria, and subject to the laws thereof; and that the defendant was discharged from the debts by the insolvent law of the Colony. Replication. 1. That when the debts were contracted the plaintiff was resident at L. in England, and that at the time of the commencement of the suit the defendant was resident in England. 2. That under and by virtue of the contracts by which

the debts became payable, they ought to have been paid to the plaintiff in England. Held that the replications showed no answer;—because the first admitted that the debts sued on were contracted within the Colony of Victoria; and the second did not show that they were payable in England, and not elsewhere. *Gardiner v. Houghton*, 743

COMMISSIONERS OF SEWERS.

Stat. 3 & 4 W. 4, c. 22, s. 13, reciting that doubts had arisen whether a presentment of a jury was not necessary on each and every occasion to repair works within the jurisdiction of Commissioners of Sewers, enacts that whenever under any commission a jury shall have presented that any person is liable to repair any defence, wall, &c., in respect of any lands, &c., it shall not afterwards, during the continuance of such commission, be necessary to inquire by jury and obtain a presentment upon any subsequent wants of reparation of the same defences, walls, &c., but such person so presented, and the owners and occupiers for the time being of such lands, &c., shall be liable from time to time to repair such defences, walls, &c., according to such presentment; and it shall be lawful for the Commissioners to order the same to be repaired by such person from time to time during the continuance of such commission accordingly. Under a commission issued in 1850, a jury in 1851 presented that S. A., being owner of lands in C. Marshes, was liable to repair a certain sea wall. By an order made in 1860 under the same Commission, upon the evidence of the marsh bailiff, that the defendant was owner of the C. Marshes, and upon the depositions of the marsh bailiff, and the execupitor and an indifferent person, it was ordered that the defendant do repair the sea wall on C. Marshes. Upon certiorari, held that the order was bad, on the ground that the above enactment did not authorize the Commissioners to make the order without a presentment of ownership by a jury; and *sembie*, per Cockburn, C. J., and Crompton, J., also on the ground that the fact of want of repair of the sea wall had not been ascertained according to law. *The Queen v. Warthon*, 719

COMPANY.

See BUILDING SOCIETY. RAILWAY CLAUSES CONSOLIDATION ACT. RAILWAY COMPANY.

COMPETENCY OF WITNESS.

See EVIDENCE.

CONDITION.

Breach of. See DEVISE.

Unreasonable. See RAILWAY COMPANY, I.

CONSTABLE, POLICE.

See ARREST.

CONSTRUCTIVE TOTAL LOSS.

See MARINE INSURANCE, II., III.

CONSULAR MANIFEST.

See CHARTER-PARTY.

CONTINUANCE IN OFFICE.

See CHURCHWARDEN.

CORONER.

See SLANDER.

CORPORATE OFFICE.

See CLERK OF THE PEACE. COSTS, V. VI.

COSTS.

I. When the decision of the Court below is affirmed on appeal, the Judges of the Exchequer Chamber being equally divided, the successful party is not entitled to costs. *Archer v. James*, 61

II. After verdict a rule nisi for a new trial was granted; and on the hearing, the cause and another cause between the same parties then pending in a county court, and all matters in difference between the parties to those causes, were by consent referred to a barrister, the costs of the causes respectively, and of the rule, to abide the event, and the costs of the reference and the award to be in the discretion of the arbitrator; the attorney for the plaintiff in both actions being the same. The arbitrator decided the cause in this Court in favour of the defendant, and the cause in the county court in favour of the plaintiff, with damages 4*s*. 10*d*., and gave the plaintiff the costs of the reference, and divided the costs of his award: Held that, under Reg. Gen. Hil. 2 W. 4, r. 93, the costs of the cause in this Court, and of the rule, could not be set off against the money and costs payable to the plaintiff in the other cause, to the prejudice of the lien of the plaintiff's attorney, as they were not "interlocutory costs in the same suit, awarded to the adverse party," within the proviso to that rule. *Littell v. Philpotts*, 383

III. Arbitrators under the Public Health Act, 1848, 11 & 12 Vict. c. 63, before they entered on the reference, but after the twenty-one days within which, by sect. 125, they ought to make their award, appointed an umpire. By sect. 127, the costs are in the discretion of the umpire, and the submission may be made a rule of Court. The umpire awarded the amount of compensation to be made to the plaintiff, and that the costs of the reference should be paid by the Local Board of Health. Held,

1. That the appointment of the umpire was not too late.

2. Per Cockburn, C. J., Blackburn and Melior, JJ., Crompton, J., dissentient, that an action could not be brought for the costs until

they had been taxed. *Holdsorth v. Barnham*, 480

IV. Where a plaintiff in an action in one of the superior Courts proves a debt exceeding 20*l*., and the defendant proves a set-off, which reduces the verdict to a sum not exceeding 20*l*., the plaintiff "recovers" the balance only within the meaning of the County Court Act, 13 & 14 Vict. c. 61, s. 11, and therefore is not entitled to costs. *Beard v. Perry*, 493

V. Information in the nature of a quo warranto alleged that the defendant, within the town of B., in the county of M., exercised, without legal warrant, the office of mayor; and together with O. R. and J. J., the powers and privileges of a body corporate, by the name and description of the Mayor and Bailiffs of the Borough of B. The defendant suffered judgment by default. Held, that the relator was entitled to costs under stat. 9 Ann. c. 20, s. 5. *Lloyd v. The Queen (in error)*, 656

VI. Quare, whether stat. 9 Ann. c. 20, does not extend to cases in which a defendant has claimed to exercise a corporate office, whether there is a corporation or not? *Id.*

VII. On an appeal from justices under stat. 20 & 21 Vict. c. 43, the case was sent back to be re-stated, and ultimately judgment was given for the appellant with costs. On the taxation, the Master allowed to the appellant the costs of preparing the case beyond the fees allowed to the clerk of the justices by sect. 3 and schedule (A.), and also the costs of amending the case. Held, that the taxation was right. *Glover, appellant, Booth, respondent*, 807

VIII. In an action on a policy of insurance in the ordinary form, with the common memorandum, on a share in The Atlantic Telegraph Company, alleging a total loss of the cable by perils of the seas; the defendant pleaded that the subject-matter of the insurance was not, nor was any part thereof, during the continuance of the risk covered by the policy, lost by the perils insured against, or any of them. Issue having been joined on this plea, the plaintiff recovered in respect of a small portion of the cable only, the rest not having been lost by the perils insured against, the damages on the portion recovered exceeding 3*l*. per cent. on the value of the policy. Held that the plea might be taken distributively, and that the verdict should accordingly be entered for the defendant as to all the claim except so far as related to the loss of the portion of the cable on which the plaintiff succeeded. *Patterson v. Harris*, 814

COUNTY COURT.

See COSTS, IV.

COURT.

I. Insolvent Debtors. See ARREST, PRIVILEGE FROM.

II. County. See COSTS, IV.

CREDIT, MUTUAL.

See MUTUAL CREDIT.

CRIMINAL CASES.

Recognisances in. See STATUTE OF FRAUDS.
L

DAMAGES.

See DEATH BY NEGLIGENCE.

DEATH BY NEGLIGENCE.

I. An action on 9 & 10 Vict. c. 93, is maintainable in cases where none could have been maintained by the deceased if he had survived the effects of the injury : as the condition in the statute that the action could have been maintained by the deceased if death had not ensued, has reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default complained of. *Pym, administratrix v. Great Northern Railway Company,* 759

II. Concessum, that in such an action, the damages must be based on pecuniary loss alone.

Id.

III. The extinction of a reasonable expectation of pecuniary advantage from the continuance of the life of the deceased, is a sufficient damage to maintain such an action. *Id.*

IV. Where the party killed was possessed of personality to the amount of about 3400*l.*, and was tenant for life of an estate in land, worth nearly 4000*l.* a year, with remainder to his eldest son in tail, and by settlement a jointure of 1000*l.* a year was settled on his wife, and 20,000*l.* secured to the younger children on his death, and the deceased died intestate ; held, that the widow and younger children had a sufficient expectation of pecuniary interest from the continuance of his life to render its loss the ground of an action. *Id.*

V. In that case, the jury having given 13,000*l.* damages, i. e. 1000*l.* for the widow and 1500*l.* for each of the younger children : held, that this was excessive, and that the damages for each of the children ought to be reduced to 1000*l.* *Id.*

DEED.

*Mortgage. See BUILDING SOCIETY.**Title. See DETINUE.*

DEPARTURE.

See PLEADING, I.

DETINUE.

Declaration in detinue for title deeds. Plea, that the deeds were intrusted to and deposited with the defendant by one G., deceased ; that the plaintiff claimed the right to the possession of them as devisee under the will of G. ; that the detention was a loss of them by the defend-

ant before the death of G., and that the defendant never had possession of them since the death of G. On demurrer to this plea : Held by Wightman, J., that the plea was bad, as it did not allege that the deeds were destroyed ; and, therefore, assuming that they were still existing and as the property in them was vested by the devise in the plaintiff, he might maintain detinue : Held by Blackburn, J., that the plea was good, as it did not admit that the defendant had possession of the deeds since they were the plaintiff's. *Goodman v. Boycott,* 1

DEVISE.

A testatrix by her will, after giving several legacies, some of which were legal and others void as being contrary to the Mortmain Act, 9 G. 2, c. 36, proceeded as follows : "I give, devise and bequeath to T. M. W. all my real estates, both freehold and copyhold, and all the residue of my personal estate and effects, to hold to him the said T. M. W., his heirs, executors, administrators and assigns, for ever, upon this express condition, that if my personal estate should be insufficient for the purpose, he or they do and shall, within twelve months after my decease, pay and discharge all and every the legacies hereinbefore bequeathed. And I feel confident that he will comply with my wish, it being my particular desire that all the above legacies shall be paid. And I do hereby charge and make chargeable all my said real and personal estate, with the payment of the aforesaid legacies and bequests." The testatrix nominated and appointed W. S. and A. C. executors and trustees of her will ; and the will contained the ordinary clauses for the protection of trustees. There were codicils of subsequent dates which did not vary the disposition of the will. The personal estate was insufficient for the payment of the legacies, and T. M. W. did not, within twelve months after the decease of the testatrix, pay any of them. Held, by this Court and affirmed by the Exchequer Chamber, that the words "upon express condition" did not create a condition for breach of which the heir might enter ; but created a trust which the defendant, taking the legal estate, would in equity be bound to perform. *Wright v. Wilkin,* 232

DEVISEE.

See DETINUE.

DISCHARGE UNDER LAW OF COLONY.

See COLONY.

DISTRESS.

See BUILDING SOCIETY.

DISTRIBUTIVE ISSUE.

See Costs, VII

DISTRICT PARISH.

An incumbent, owner of a tithe rent charge, who voluntarily endows a District parish formed, for spiritual purposes, out of part of his own parish, by granting to the minister of such new District parish a rent charge charged on the tithe rent charge, is not entitled, in an assessment to the poor rate, to claim a deduction from the total amount of tithe rent charge in respect of the portion which he has thus granted away. *Lawrence, appellant, Overseers of Tolleskunt Knights, respondents,* 533

See BURIAL ACTS, I. II. IV.
CHURCH BUILDING ACTS.

DOCK.

Company. See NEGLIGENCE.

Rating of. See LOCAL GOVERNMENT ACT.

EVIDENCE.

On the hearing of an information before two justices of the peace, preferred under the 9 G. 4, c. 61, against a person licensed to sell excisable liquors by retail, for that he did "unlawfully and knowingly permit and suffer persons of notoriously bad character to assemble and meet together in his house and premises:" held,

1. That the defendant was not a competent witness.
2. It having been proved that on the occasion in question a number of prostitutes (fourteen at the least) assembled and met together at the house of the defendant, that it was admissible evidence against him that on a previous occasion several of the same prostitutes assembled and met together at his house. *Parker, appellant, Green, respondent,* 299

FOREIGN JUDGMENT.

I. Where an action is brought on a judgment obtained in a foreign Court, the pendency of an appeal in the foreign Court against that judgment is no bar to the action; although it may afford ground for the equitable interposition of the English Court in which the action is brought to prevent the possible abuse of its process, and on proper terms to stay execution. *Scott v. Pilkington. Munro v. Pilkington,* 11

II. Concessum, that the judgment of a foreign Court having jurisdiction over the subject-matter cannot be questioned here, on the ground that the foreign Court has mistaken the law of its own country, or has come, on the evidence, to an erroneous conclusion as to the facts. *Id.*

III. In an action on a judgment obtained by the plaintiff against the defendant in the Supreme Court of New York, the defendant pleaded that the judgment was erroneous according to the law of New York, and was liable to be reversed, and that he was prosecuting proceedings in appeal, which were then pending; and

he set out the record of the proceedings in the original suit there, by which it appeared that the cause had been referred by order of the Court, not to a private arbitrator selected by the parties, but to an officer of the Court directed to ascertain the facts, who found certain facts, with a certain conclusion of law from them, and judgment was given accordingly in favour of the plaintiff; although the same conclusion would not have followed by the English law had the same facts been found to have occurred here: held, that the plea was no answer to the action. *Id.*

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

GENERAL DEMURRER.

See PLEADING, I.

GUARDIANS, BOARD OF.

See CLERK TO BOARD OF GUARDIANS.

GUNPOWDER, KEEPING.

Where several packages of gunpowder, amounting in the whole to 300 lbs. weight, were sent by different persons to a warehouse in the metropolis belonging to a carrier and licensed carman, as a temporary halting place in their transit, until they should afterwards be forwarded by country carriers to their several destinations: held, that this was not an unlawful having or keeping of gunpowder within 12 G. 3, c. 61, s. 11. *Biggs, appellant, Mitchell, respondent,* 523

HAWKERS' ACT.

A person who resided in L., brought a quantity of drapery goods from thence to H., which he said were the remains of the stock of a Company, and there sold them without a license: Held, that he was subject to the duty imposed by stat. 50 G. 3, c. 41, s. 6, as "a trading person going from town to town," and therefore was liable to be convicted under sect. 17. *Manson, appellant, Hope, respondent,* 498

HIGHWAY.

I. By sect. 73 of stat. 5 & 6 W. 4, c. 50, if any matter or thing shall be laid upon a highway so as to be a nuisance, and shall not, after notice given by the surveyor, &c., be forthwith removed, it shall be lawful for the surveyor, &c., by order of a justice, to clear the highway by removing the said matter or thing, and to dispose of the same. Upon an application for an order under the above section against a person through whose land a road passed, held, that the justices had jurisdiction to try whether the locus in quo was a highway or only an occupation road. *Williams v. Adams,* 312

II. Where an erection or excavation exists upon land, and the land on which it exists, or to which it is contiguous, is dedicated to the public as a highway, the dedication must be taken to be made to the public and accepted by them, subject to the inconvenience or risk arising from the existing state of things. *Fisher v. Prowse. Cooper v. Walker,* 770

Nuisance to.

I. A person, without the authority of Parliament, but with the concurrence of and by virtue of a contract with the vestry of the parish, laid down in one of the streets of the metropolis a double line of tramways on which omnibuses of a peculiar construction plied for hire. These tramways were dangerous and inconvenient to many of the public, as the wheels of vehicles skidded when crossing the tramway, and horses which put their feet upon it were startled : held,

1. That this was a public nuisance, even though those tramways might be for the convenience of the public generally.

2. That what was here done could not be looked on as a mode of paving the street, and consequently not within the powers conferred on vestries by The Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 98. *The Queen v. Train,* 640

II. The defendant occupied a house adjoining to a public street, with a cellar belonging to it, which cellar had existed before the defendant had anything in the house. The mouth of this cellar opened into the footway of the street by a trap door. During the day this trap door was open, but at night it was closed by a flap, which slightly projected above the footway, and it had so projected as long as living memory went back. The plaintiff, coming along the footway at night, stumbled over this flap, fell, and sustained injury, for which he brought an action. Held, that the jury ought to draw the conclusion that the cellar flap had existed as long as the street, and that the dedication of the way to the public was with the cellar flap in it, and subject to its being continued there ; and, therefore, that the defendant was not liable, as the maintenance of such an ancient cellar flap was not unlawful. *Fisher v. Prowse. Cooper v. Walker,* 770

III. Declaration for negligently and improperly placing in a public street certain steps, so that the same were an obstruction to persons using the street, and dangerous to persons passing along it at night ; and averring that the plaintiff, passing along the street, fell over them and was injured. Plea, that the street was subject to the right of the occupiers of a house adjoining it to have steps standing in the highway and leading up to the outer door of the house, all persons passing along the highway being entitled to pass on foot over the steps as a part of the highway, which

steps were part of the house ; that, the street being lowered under The Metropolis Local Management Act, 18 & 19 Vict. c. 120, the old steps were necessarily removed, and the present steps placed in their room ; that the new steps were placed on the same part of the highway on which the old steps had stood, and caused no greater obstruction or danger than did the old steps. Held that the plea was good, as the former highway was subject to the right on the part of the occupiers of the defendant's house to keep these steps there, and the lowered highway was subject to a similar right. *Id.*

Diversion of.

After notice and grounds of appeal against a certificate of justices for the diversion of a highway, the person at whose instance the certificate was given gave notice that he abandoned further proceedings, and should not apply to the Quarter Sessions for the enrolment of the certificate. The appeal was entered, and, being called on and no one appearing, was struck out. Afterwards on the same day the appellant applied for costs under stat. 5 & 6 W. 4, c. 50, s. 90, by which the Quarter Sessions are authorized and required to award to the party giving or receiving notice of appeal such costs and expenses as shall be incurred in prosecuting or resisting such appeal, whether the same shall be tried or not : Held, that the Quarter Sessions were bound to make an order for the costs. *The Queen v. The Justices of the West Riding of Yorkshire, &c.,* 811

HOLIDAYS.

The last day for resealing a writ of summons, so as to save the Statute of Limitations, expired on Saturday the 28th December, within the Christmas holidays. A party who attended at the office on that day for the purpose found it shut, and the officer having refused to reseal the writ on the following Monday, the 30th, the Court refused to order him to do it afterwards, *nunc pro tunc. Evans v. Jones,* 45

INCUMBENT.

See RATE, POOR.

INFORMATION.

See MASTER AND SERVANT, II.

Withdrawal of.

Two informations were laid against a party, one charging him with the rescue of a person out of lawful custody, and the other with an assault on two police constables ; but on the party being brought up before the petty sessions, the first of these informations was withdrawn : held, that this was no valid ground of objection to proceeding on the second information. *Galliard, appellant, Laxton, respondent,* 363

INSOLVENT DEBTORS' COURT.

See ARREST, PRIVILEGE FROM.

INSURANCE.

See MARINE INSURANCE.

INTERLOCUTORY COSTS.

See COSTS, II.

ISSUE.

See COSTS, VIII.

JUDGMENT, FOREIGN.

See FOREIGN JUDGMENT.

JURISDICTION OF JUSTICES.

*See HIGHWAY, RATE, CHURCH, III., IV.
PAUPER LUNATIC.*

JURY LISTS, SIGNING.

See CHURCHWARDEN, II.

JUSTICES.

*Jurisdiction of. See HIGHWAY, I. RATE,
CHURCH, III., IV.**Of borough. See PAUPER LUNATIC, I., II.*

KEEPING GUNPOWDER.

See GUNPOWDER.

LANDLORD AND TENANT.

See BUILDING SOCIETY.

LANDS CLAUSES CONSOLIDATION ACT.

Declaration stated that the defendants, a railway Company, under the powers of their Act, took for the purposes of their railway a portion of a highway from L. to W., and constructed the railway across it, and a deviation road and bridge over the railway, and by the execution of the railway and works houses of the plaintiff were injuriously affected; and set out proceedings in an arbitration under The Lands Clauses Consolidation Act, 1845, by which the umpire appointed by the arbitrators awarded compensation to the plaintiff. Plea, setting out the form of the appointment of the arbitrator on the part of the defendants, and the award, which recited the notice of the plaintiff to the defendants that, by the execution of the railway and works, they had injuriously affected certain houses of which the plaintiff was lessee, being four houses on the highway, and eight other houses which, at the time of the execution of the works, were in course of erection for the purpose of being used as dwelling-houses, fronting a new road running at right angles to the highway, and found, that by reason of the obstruction of the highway, by the construction of the railway across the same, the access to the houses of

the plaintiff was, notwithstanding the substitution of the deviation road, rendered less convenient for the occupiers, and many persons would be prevented from passing the same, and the houses had thereby been rendered less suitable for being used and occupied as shops, and the value of the houses had been greatly diminished. On demurrer, held by this Court, and affirmed by the Exchequer Chamber, that the houses of the plaintiff were injuriously affected within The Lands Clauses Consolidation Act, 1845, s. 9 Vict. c. 18, s. 68, and The Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 6, and therefore the plaintiff was entitled to compensation. *Chamberlain v. The West End of London and Crystal Palace Railway Company,* 605

LAW, MISTAKE OF.

I. *Concessum, that the judgment of a foreign Court having jurisdiction over the subject-matter cannot be questioned here, on the ground that the foreign Court has mistaken the law of its own country, or has come, on the evidence, to an erroneous conclusion as to the facts.* *Scott v. Pilkington. Munros v. Pilkington,* 11

II. In an action on a judgment obtained by the plaintiff against the defendant in the Supreme Court of New York, the defendant pleaded that the judgment was erroneous according to the law of New York, and was liable to be reversed, and that he was prosecuting proceedings in appeal, which were then pending; and he set out the record of the proceedings in the original suit there, by which it appeared that the cause had been referred by order of the Court, not to a private arbitrator selected by the parties, but to an officer of the Court directed to ascertain the facts, who found certain facts, with a certain conclusion of law from them, and judgment was given accordingly in favour of the plaintiff; although the same conclusion would not have followed by the English law had the same facts been found to have occurred here: held, that the plea was no answer to the action. *Id.*

LEASE.

The defendant leased a farm to the plaintiff for fourteen years by deed, reserving rent payable quarterly. The deed contained various clauses by which the plaintiff and the defendant agreed respectively to do certain things, and concluded with the following clause: "And the said landlord further agrees and orders that R. K., or his appointed agent, is to receive all rents from the tenant at all times when it becomes due during the said term hereby granted, and his receipt to be a full and sufficient discharge from all liability thereof." Held that, R. K. having no interest in the rent, the agreement or authority for him to receive it was revocable. *Vanning v. Bray,* 502

LEX FORI.

I. Questions of procedure are to be determined by the lex fori, not by the lex loci contractus. *MacFarlane v. Norris*, 783

II. Semble, that set-off is matter of procedure, and, as such, determinable by the lex fori. *Id.*

LEX LOCI CONTRACTUS.

I. In an action on a contract where the question at issue has no relation to the manner of performing the contract, or to the consequences of non-performance, and relates entirely to the effect of the transaction at the place where it was entered into, the liability of the defendant must be determined by the lex loci contractus. *Scott v. Pilkington. Munros v. Pilkington*, 11

II. Questions of procedure are to be determined by the lex fori, not by the lex loci contractus. *MacFarlane v. Norris*, 783

LICENSE.

Alehouse.

A Court of Quarter Sessions, at an annual licensing meeting, refused to renew a license to keep an inn, alehouse and victualling house under stat. 9 G. 4, c. 61, on the ground that the applicant declined to take out an excise license for the sale of spirits: held, that this was not a sufficient legal ground for such refusal. *The Queen v. Sylvester*,

322

Excise. See PROSTITUTES.

Hawker's. See HAWKERS' ACT.

LIEN OF ATTORNEY.

See COSTS, II.

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS.

LISTS, JURY, SIGNING.

See CHURCHWARDEN.

LOCAL ACT.

See RATE, CHURCH, 3.

LOCAL GOVERNMENT ACT.

I. The Newport Dock Company, incorporated under stat. 5 & 6 W. 4, c. lxxv., were the owners and occupiers of a dock for the reception of ships, with quays, warehouses, cranes, weighing machines and other works, and also of railways or tramroads for transporting traffic to and from the dock, and communicating with their warehouses and with other railways. The railways or tramroads were made under the powers of their Act, and were free to the public on payment of certain tolls. By the Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 55, the general district rates shall be

made and levied upon the occupier of all such kinds of property as are assessable to the poor rate, subject to this, among other exceptions, that "the occupier of any land covered with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance," is to be assessed at one fourth only of the net annual value. Held,

1. That the dock was "land covered with water," within the exception and therefore rateable at one fourth only of the net annual value.

2. That the warehouses and other adjuncts to the dock were rateable at the net annual value.

3. That the railways or tramroads were constructed "for public conveyance" within the exception, and therefore rateable at one fourth only of the net annual value. *Newport Dock Company*, appellants, *Local Board of Health of Newport*, respondents, 708

II. M. B., a District not having any ascertained or defined boundary, and a portion of the parish of M., obtained from the Secretary of State for the Home Department an order, under sect. 16 of The Local Government Act, 1858, 21 & 22 Vict. c. 98, settling its boundaries for the purposes of that Act, and subsequently adopted the Act within the District. Afterwards the parish of M. adopted the Act. The Court refused a mandamus to the Secretary of State to publish the notice of the adoption of the Act by M. B. District, under sect. 19: holding that sect. 14 applied to places the boundaries of which were settled by an order of the Secretary of State, and therefore that the District of M. B. could not adopt the Act unless the parish of M. had refused to do so. *Matlock Bath District*, 543

LOCAL MANAGEMENT METROPOLIS ACT.

See HIGHWAY, NUISANCE TO, I., III.

LUNATIC.

See PAUPER LUNATIC.

MAINTENANCE, ORDER OF.

See PAUPER LUNATIC, II., III.

MALICE.

See SLANDER.

MARINE INSURANCE.

I. Where goods are insured by a policy of marine insurance in the ordinary form, the expression "warranted free from particular average" is not confined to losses arising from injury to, or deterioration of, the goods themselves; but is equivalent to a stipulation against total loss and general average only; and, consequently, includes expenses incurred

his when applied to the pieces of iron used for holding together the ends of rails to make them for practical purposes a continuous solid body, had previously been known and used as applied to pieces of iron used for holding together the broad sides of pieces of wood, placed vertically upon one another, to make them for practical purposes a continuous solid body; but had never been applied for the purpose of fastening timbers placed end to end in contact with each other: Held, by the Exchequer Chamber, reversing the judgment of the Queen's Bench, that the alleged invention was a mere application of an old contrivance in the old way to an analogous subject, without any novelty or invention in the mode of applying such old contrivance to the new purpose, and therefore was not a valid subject-matter for a patent.

2. Before the date of the patent, a scarf-joint in a railway bridge had been fished by means of a grooved plate of iron running the whole length of the bridge for the purpose of supporting its flooring, as well as for fishing the joint: but the iron plate was not used with the view either of obtaining greater strength with an equal weight of metal, or of preventing the heads of the bolts from turning round, both which purposes were contemplated by the patent: Held, by the Queen's Bench (*see Quere* by the Exchequer Chamber), that this was not a prior use of the invention which invalidated the patent. *Harwood v. The Great Northern Railway Company,* 194

PAUPER LUNATIC.

I. A justice of a borough not having a quarter sessions has no jurisdiction, under sect. 67 of stat. 16 & 17 Vict. c. 97, to send a pauper lunatic to an asylum; and this by reason of the meaning assigned to the word "borough" by the interpretation clause, sect. 132. *Churchwardens of Faversham, appellants, Guardians of Isle of Thanet Union, respondents,* 275

II. The jurisdiction of justices under sect. 97 of that Act to adjudge the settlement of a pauper lunatic and make an order for his maintenance, attaches where he is de facto confined in an asylum; and their order is not invalidated by the fact that he was sent there by a justice who had no jurisdiction: (*per Wightman and Mellor, J.J.; Crompton, J., dissentente.*) Id.

III. In 1854, a pauper lunatic was sent to an asylum at the charge of the parish of C., in which she had acquired the status of irremovability. Her maintenance was charged to C., and allowed in the half-yearly audits until Michaelmas, 1860, when the overseer of C. objected that they ought to be charged to the common fund of the Union to which C. belonged. The auditor disallowed the costs for the six months ending Michaelmas, 1860, against the parish, and transferred them to the common Union fund account, but refused to reopen the accounts previously audited. On motion to vary the allowance, brought up by

to reopen the accounts previously audited. On motion to vary the allowance, brought up by certiorari under stat. 7 & 8 Vict. c. 101, s. 35, by crediting the parish of C. with the sums paid in previous years and debiting the common fund of the Union with those sums: held, that the auditor did right in not reopening the accounts previously audited. *The Queen v. The Inhabitants of Chiddington,* 294

PILOT.

See NEGLIGENCE.

PLEADING.

I. Declaration stated that the defendants wrongfully raised an embankment near the plaintiff's house, and wrongfully continued the same, by reason whereof large quantities of water flowed against and into the house: with an averment of special damage. Plea, that the embankment was raised and continued by the defendants under certain Acts of Parliament. Replication: that, although the embankment was raised and continued under the Acts of Parliament, the flowing of the water against and into the plaintiff's house was occasioned by the wrongful construction and negligent and improper raising of the embankment, and the want of proper and sufficient drains to the same, and the continuing the embankment so wrongfully constructed and insufficiently drained. On demurrer, held:

1. That a departure in pleading was ground of general demurrer.

2. That the replication was not a departure from the declaration; by Crompton and Blackburn, J.J., Cockburn, C. J., not assenting. *Brine v. The Great Western Railway Company,* 402

II. A declaration for breach of a covenant or contract for quiet enjoyment must allege an eviction by a person claiming title paramount. *Hall v. The City of London Brewery Company, Limited,* 737

POLICE CONSTABLE.

See ARREST.

POOR LAW AUDIT.

In 1854, a pauper lunatic was sent to an asylum at the charge of the parish of C., in which she had acquired the status of irremovability; her maintenance was charged to C., and allowed in the half-yearly audits until Michaelmas, 1860, when the overseer of C. objected that they ought to be charged to the common fund of the Union to which C. belonged. The auditor disallowed the costs for the six months ending Michaelmas, 1860, against the parish, and transferred them to the common Union fund account, but refused to reopen the accounts previously audited. On motion to vary the allowance, brought up by

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POOR RATE.

See RATE, POOR.

POST, SERVICE BY.

See PROCESS, SERVICE OF.

PRESENTMENT.

See COMMISSIONERS OF SEWERS.

PRIVILEGE FROM ARREST.

See ARREST, PRIVILEGE FROM.

PROCESS, SERVICE OF.

By stat. 4 & 5 W. 4, c. 76, s. 79, no pauper shall be removed under any order of removal until twenty-one days after a notice of chargeability, accompanied by a copy of the order and of the examination, shall have been sent "by post or otherwise," by the overseers of the parish obtaining the order, to the overseers of the parish to whom the order is directed. Held that, admitting that the delivery of those documents in the ordinary manner would be service of an order or process within stat. 29 Car. 2, c. 7, s. 6, the transmission of them by post under sect. 79 of stat. 4 & 5 W. 4, c. 76, where, by the ordinary course of post, they reached on Sunday the hands of the overseers of the parish to whom the order was directed, was not void by stat. 29 Car. 2, c. 7, s. 6. *The Queen v. The Inhabitants of Leominster,* 391

PROHIBITION.

See RATE, CHURCH, II.

PROSTITUTES.

Prostitutes, as such, are "persons of notoriously bad character" within the meaning of a license to sell excisable liquors. *Parker v. Green,* 299

PUBLIC NUISANCE.

See HIGHWAY, NUISANCE TO.

PUBLIC HEALTH ACT.

I. Arbitrators under the Public Health Act, 1848, 11 & 12 Vict. c. 63, before they entered on the reference, but after the twenty-one days within which, by sect. 125, they ought to make their award, appointed an umpire. By sect. 127, the costs are in the discretion of the umpire, and the submission may be made a rule of Court. The umpire awarded the amount

of compensation to be made to the plaintiff, and that the costs of the reference should be paid by the Local Board of Health. Held,

1. That the appointment of the umpire was not too late.

2. Per Cockburn, C. J., Blackburn and Melior, J.J., Crompton, J., dissentiente, that an action could not be brought for the costs until they had been taxed. *Holdsworth v. Barnshaw, &c.,* 480

II. A Local Board of Health for a non-corporate district, acting under The Public Health Act, 1848 (11 & 12 Vict. c. 63), gave notice to the owners of the premises fronting, adjoining, or abutting on certain streets, requiring them to "sewer, level, pave, flag, and channel" the same, according to the provisions of sect. 89 of that Act; which notices not being complied with within the specified time, the Board entered into contracts with a third person for the performance thereof; which contained provisions that the contractor was to be paid for the work when the money was collected from the owners of the adjacent properties: the work was done accordingly, but the owners having refused payment, the justices of the peace before whom they were summoned for non-payment dismissed the summonses: Held, on a case in which the Court was empowered to draw inferences of fact, that the contractor was entitled to sue the Board of Health for the work done by him under the contracts. *Worthington v. Sudlow, &c.,* 508

QUARTER SESSIONS.

Appeal at.

I. An order for the removal of a pauper and his family from the parish of F. to the parish of C. was made on the 18th August, 1860, and notice of chargeability, accompanied by a copy of the order and a statement of the grounds thereof, including the particulars of the settlement relied on, were sent on the 30th August, and a copy of the depositions upon which the order was made were delivered on the 19th September. On the 1st of October notice of appeal to the next Quarter Sessions for the county of S. was given. Those Sessions were held for the Eastern division of that county on the 16th October at A., and for the Western division, within which the respondent parish was situated, on the 18th October at B. The appellants did not, at any time on or before the day and year last aforesaid, send or deliver to the respondents any statement in writing or otherwise of the grounds of the appeal. By the custom and practice of those Sessions, eight days' notice of appeal was required. The appellants applied to the Sessions at B. to receive and enter the appeal, and to respite it to the next Quarter Sessions as matter of right, and without showing any reason for the delay: held, that they had a right to do so, as they had not been guilty of any laches in giving

their notice of appeal: per Crompton and Mellor, JJ., dissentientie Blackburn, J. *The Queen v. The Justices of Sussex,* 664

II. After notice and grounds of appeal against a certificate of justices for the diversion of a highway, the person at whose instance the certificate was given gave notice that he abandoned further proceedings, and should not apply to the Quarter Sessions for the enrolment of the certificate. The appeal was entered, and, being called on and no one appearing, was struck out. Afterwards on the same day the appellant applied for costs under stat. 5 & 6 W. 4, c. 50, s. 90, by which the Quarter Sessions are authorized and required to award to the party giving or receiving notice of appeal such costs and expenses as shall be incurred in prosecuting or resisting such appeal, whether the same shall be tried or not: Held, that the Quarter Sessions were bound to make an order for the costs. *The Queen v. The Justices of the West Riding of Yorkshire, &c.,* 811

Costs at. See APPEAL AT, II.

QUIET ENJOYMENT.

I. In a contract for the demise of land, a promise of quiet enjoyment during the term is implied by law. *Hall v. The City of London Brewery Company, Limited,* 737

II. A declaration for breach of a covenant or contract for quiet enjoyment must allege an eviction by a person claiming title paramount.

Id.

QUO WARRANTO.

See COSTS, V., VI.

RAILWAY AND CANAL TRAFFIC ACT.

See RAILWAY COMPANY, I.

RAILWAY COMPANY.

I. A passenger by railway from L. to W., took with him two horses and a retriever dog; the horses were put into a horse-box, and a servant of the defendants proposed that the dog should be placed in the horse-box, to which the plaintiff assented. The dog was fastened in the horse-box by means of a leather collar round its neck, and a strap thereto, which passed through a ring fixed to the side of the horse-box; the collar and strap were furnished by the plaintiff, and were his property. The plaintiff's agent signed a ticket, subject to the following conditions: "The company will not be liable in any case for loss or damage to any horse or other animal above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner or his agent at the time of booking the same, has been given to them, and by such declaration the owner shall be bound, the Company not being in any event liable to any greater amount than the value so declared. The Company will

in no case be liable for injury to any horse or other animal or dog, of whatever value, when such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*, the price of conveyance will, in addition to the regular fare, be after the rate of 2*½* per cent., or 6*d.* in the pound, upon the declared value above 40*l.* [or 5*l.*], whatever may be the amount of such value, and for whatever distance the horse or other animal is to be carried." The plaintiff made no declaration of the value of the dog, and paid 3*s.* for the carriage of it. On the arrival of the train at W. a window in the horse-box was found open, through which the dog had escaped, and was lost. The Court having power to draw inferences of fact,

1. Held by this Court, and affirmed by the Exchequer Chamber, that the loss of the dog was not occasioned by neglect or default of the plaintiff, or of the defendants.

2. Held, per Cockburn, C. J., and Blackburn, J., that a dog is one of the animals to which the proviso in sect. 7 of The Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, relates; and, per Wightman, J., and the Exchequer Chamber, that the defendants had made themselves liable as common carriers for carrying the dog.

3. Held, per Cockburn, C. J., and Blackburn, J., that the conditions in the ticket were not just and reasonable within that section, in two respects: first, because the meaning of the ticket was, that if the value of the dog exceeded 5*l.*, and its value was not declared, the Company would not be liable for loss or damage occasioned by their own negligence: secondly, because, in the absence of evidence by the Company showing the contrary, the extra charge of 2*½* per cent. was excessive; and therefore, the conditions being void, the Company were liable, as common carriers, for the full value of the dog. But, per Wightman, J., the meaning of the ticket was that the Company would not in any case be liable for loss or damage beyond 5*l.* unless the value was declared, and that this was a reasonable condition; and that the Court had no means of ascertaining whether the extra charge of 2*½* per cent. was reasonable or not, and therefore the plaintiff was not entitled to recover more than 5*l.*

4. Held by the Exchequer Chamber, Erle, C. J., Williams and Keating, JJ., and Channell, B., reversing the judgment of the Queen's Bench (Wilde, B., dissentientie), that, assuming sect. 7 applied to the case, the conditions in the ticket were just and reasonable within that section; because the effect of the first condition was not to exempt the defendants from liability for loss or injury occasioned by wilful wrong; and if it exempted them from responsibility for any negligence it was severable, and valid to exempt when there was no negligence; and it lay upon the plaintiff to show that the extra

charge in the third condition was exorbitant or unfair, and the question whether it was so was for a jury, and not for the Court.

5. Held by Erie, C. J., and Keating, J., that sect. 7 was confined to cases in which the loss or injury was occasioned by misconduct on the part of the Company, and did not apply where it occurred through pure accident. *Harrison v. The London, Brighton, and South Coast Railway Company,* 122

II. The plaintiff, arriving in London by the defendants' railway on Saturday evening, left a portmanteau at the luggage and cloak office on the up platform of the Paddington Station, and on paying 2d. received a ticket acknowledging the receipt with printed conditions, among which was a notice that the Company would not "deliver up luggage except to persons producing the proper receipt." On Sunday evening, intending to leave London by another railway, he came to the Paddington Station for his portmanteau, and found the office shut. After some time he was told by a porter that the superintendent was on the other side; whereupon he went across to the down platform, from which a train was starting, and the superintendent sent a porter with a key of the office, and he obtained his portmanteau. He was thus delayed forty minutes, and prevented from leaving London by the other railway that night. In an action for not redelivering the portmanteau within a reasonable time the jury found for the plaintiff: Held, that by the ticket the defendants were bound to deliver up the portmanteau on Sunday as well as on other days, on a reasonable request and within a reasonable time; and that whether there had been an unreasonable delay was a question for the jury. *Stallard v. The Great Western Railway Company,* 419

course of erection for the purpose of being used as dwelling-houses, fronting a new road running at right angles to the highway, and found, that by reason of the obstruction of the highway, by the construction of the railway across the same, the access to the houses of the plaintiff was, notwithstanding the substitution of the deviation road, rendered less convenient for the occupiers, and many persons would be prevented from passing the same, and the houses had thereby been rendered less suitable for being used and occupied as shops, and the value of the houses had been greatly diminished. On demurrer, held by this Court, and affirmed by the Exchequer Chamber, that the houses of the plaintiff were injuriously affected within The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 68, and The Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 6, and therefore the plaintiff was entitled to compensation. *Chamberlain v. The West End of London and Crystal Palace Railway Company,* 605

[Railways Clauses Act.

By the effect of the 77th, 78th, and 79th sections of the Railways Clauses Consolidation Act, 1845, a railway company on purchasing, under that statute, land for the purposes of the railway, does not become entitled to the mines under the land; the owner may work them after notice duly given; and if, after such notice, the company, though desiring to prevent the working, does not give compensation for the minerals, the owner may work them up to and under the railway, working them in a "proper manner" and "according to the usual manner of working such mines in the district." The company cannot, under this statutory purchase, claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support, the statute having created a specific law for such matters, by which alone the rights of the company and the mine owner are regulated.

The Dudley Canal Company v. Gracebrook, 1 B. & Ad. 59, approved. The Proprietors, &c., of the Great Western Railway Company v. Bennett, H. of L., 868]

Rating of. See LOCAL GOVERNMENT ACT.

RATE.

Poor.

An incumbent, owner of a tithe rent charge, who voluntarily endows a District parish formed, for spiritual purposes, out of part of his own parish, by granting to the minister of such new District parish a rent charge charged on the tithe rent charge, is not entitled, in an assessment to the poor rate, to claim a deduction from the total amount of tithe rent charge in respect of the portion which he has thus granted away. *Lawrence, appellant, Overseers of Tolleshunt Knights, respondents,* 533

Church.

I. Sect. 70 of stat. 58 G. 3, c. 45, which authorizes rates for the "repairs" of district churches, includes rates "to be raised within the district, in like manner as in case of repairs of churches by parishes," for the expenses necessary for the due performance of the offices of the church, as well as for the repairs of the fabric. *The Queen v. Consistorial Court of London,* 339

II. The parish of L. was divided into three ecclesiastical districts, under sect. 21 of stat. 58 G. 3, c. 45, and subject to the provisions of that and the other Church Building Acts; and one of such districts was assigned to a church called the church of St. B., built under the provisions of those Acts at S., and was called the district parish of St. B., S. A rate was made in form "for and towards the repairs of the district parish church of St. B., S.," but in fact for other necessary expenses also, such as lighting and washing, and stationery for registers, &c. Upon a rule for a prohibition, held, that the expenses for which the rate was made were legal. *Id.*

III. By a local Act the vestry of the parish of C. were empowered to make rates, among other things, for the maintenance of the church, and an appeal to the Quarter Sessions was given against any rate. By an amending Act every rate was to be enforced by summons before two justices, and if the person summoned should not prove to the justices that he was not chargeable with or liable to pay such rate, he should pay it. A person in that parish who was summoned for non-payment of church rate proposed to give evidence to show that the rate had not been duly made, which evidence the justices declined to hear. Held, that the justices had no jurisdiction to inquire into the validity of the rate, and therefore had no power to state a case for a superior Court under stat. 20 & 21 Vict. c. 43, s. 2. *Ex parte May,* 426

IV. A person summoned before justices for non-payment of a church rate contended that the summons should be dismissed on the grounds that the rate was wrongly described in the summons and that the rate was illegally made. These grounds of objection having been argued, and the magistrates being about to deliberate, he gave notice that he disputed the validity of the rate and his liability to pay it; and thereupon the justices decided that their jurisdiction was taken away by the third proviso to sect. 7 of stat. 53 G. 3, c. 127. This Court refused a rule on the justices to make an order for payment of the rate. *Ex parte Mansering, &c.,* 431

REASONABLE AND PROBABLE CAUSE,
WANT OF.

See SLANDER, II.

RECOGNISANCES IN CRIMINAL CASES.

See STATUTE OF FRAUDS, I.

REGISTRAR.

See SUPERINTENDENT REGISTRAR.

REGULA GENERALIS.

H. 2 W. 4, r. 93. *See Courts, II.*

H. 25 Vict., p. 60.

REMOVAL, ORDER OF.

I. Stat. 9 & 10 Vict. c. 66, s. 4, by which "no warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness, unless the justices granting the warrant shall state in such warrant that they are satisfied that the sickness will produce permanent disability," applies only to the case of sickness of the person removed. *The Queen v. The Inhabitants of St. George, Middlesex,* 317

II. Therefore where a man, in consequence of sickness, left his wife and children in the respondent parish, and went into an hospital in another, and his wife and children became chargeable to the respondent parish, it was held that an order for their removal to the parish of his settlement need not state that the justices were satisfied that the sickness would produce permanent disability. *Id.*

III. By stat. 4 & 5 W. 4, c. 76, s. 79, no pauper shall be removed under any order of removal until twenty-one days after a notice of chargeability, accompanied by a copy of the order and of the examination, shall have been sent "by post or otherwise," by the overseers of the parish obtaining the order, to the overseers of the parish to whom the order is directed. Held that, admitting that the delivery of those documents in the ordinary manner would be service of an order or process within stat. 29 Car. 2, c. 7, s. 6, the transmission of them by post under sect. 79 of stat. 4 & 5 W. 4, c. 76, where, by the ordinary course of post, they reached on Sunday the hands of the overseers of the parish to whom the order was directed, was not void by stat. 29 Car. 2, c. 7, s. 6. *The Queen v. The Inhabitants of Leominster,* 391

IV. An order for the removal of a pauper and his family from the parish of F. to the parish of C. was made on the 18th August, 1860, and notice of chargeability, accompanied by a copy of the order and a statement of the grounds thereof, including the particulars of the settlement relied on, were sent on the 30th August, and a copy of the depositions upon which the order was made were delivered on the 19th September. On the 1st of October notice of appeal to the next Quarter Sessions for the county of S. was given. Those Sessions were held for the Eastern division of that county on the 15th October at A., and for the Western

division, within which the respondent parish was situated, on the 18th October at B. The appellants did not, at any time on or before the day and year last aforesaid, send or deliver to the respondents any statement in writing or otherwise of the grounds of the appeal. By the custom and practice of those Sessions, eight days' notice of appeal was required. The appellants applied to the Sessions at B. to receive and enter the appeal, and to respite it to the next Quarter Sessions as matter of right, and without showing any reason for the delay: held, that they had a right to do so, as they had not been guilty of any laches in giving their notice of appeal: *per Crompton and Mellor, JJ., dissentientem Blackburn, J.* *The Queen v. The Justices of Sussex,* 664

Suspension of.

Upon an application, under stat. 35 G. 3, c. 101, s. 2, for a warrant of distress to levy the charges incurred by the suspension of an order of removal, the justice cannot inquire into the merits of the order directing payment, but is bound to enforce it by issuing his warrant. And this holds even where, by reason of the amount ordered to be paid not exceeding 20*l.*, there is no appeal against the order. *The Queen v. Higginson, &c.,* 471

RENT.

See BUILDING SOCIETY. LEASE.

Charge, Tithe. *See DISTRICT PARISH.*

REPAIR.

See COMMISSIONERS OF SEWERS. CHURCH RATE, I., II.

REPLICATION.

See PLEADING, I.

RESEALING.

See SUMMONS, WRIT OF.

REVOCATION OF AUTHORITY.

See AUTHORITY, REVOCATION OF.

SCOTCH BANKRUPTCY.

I. The Bankruptcy (Scotland) Act, 1856, 19 & 20 Vict. c. 79, s. 47, enacts that a warrant granting protection shall protect the debtor from arrest in Great Britain and Ireland, and Her Majesty's other dominions, for civil debt contracted previous to the sequestration; but such warrant shall not be of any effect against the execution of a warrant of apprehension in meditantes fugae or ad factum praestandum, or for any criminal act: Held, that the exception extended to like process in England and Ireland and other parts of the Queen's dominions. *Dutton v. Halley,* 748

II. The defendant being about to leave this country for New Zealand, was arrested on a

capias under stat. 1 & 2 Vict. c. 110, s. 3. The plaintiff had proved his debt in Scotland; and a warrant of protection had been granted to the defendant for a limited period, which had not elapsed when he was arrested: held, that the defendant was not entitled to be discharged. *Id.*

III. The plaintiff sued as trustee of the estate and effects of a bankrupt in Scotland, under a sequestration in that country; for money received for the use of the plaintiff as trustee after the bankruptcy, and for interest due from the defendant to the plaintiff as trustee after the bankruptcy. The defendant pleaded that, before he had notice of the bankruptcy, and before the sequestration, he gave credit to the bankrupt by becoming the endorsee and holder bona fide, within the meaning of the Scotch law, of a bill of exchange drawn by M. & Co. upon the bankrupt for the sum, &c., and accepted by the bankrupt, which bill became payable after the bankruptcy, and "which credit so given was a credit of a nature likely to end in a debt from the bankrupt to the defendant, and the amount of the said acceptance was, at the time of the commencement of this suit, and still is, due to the defendant, and, together with interest thereon, equals the plaintiff's claim: and the bankrupt gave credit to the defendant by consigning goods to him for sale for the said bankrupt, and upon the terms that the proceeds should be remitted and paid to the bankrupt in Scotland: and that the money sought to be recovered by the plaintiff is the proceeds of and money arising from the sale of the said goods under and according to the terms of the said consignment, and which said consignment was of a nature likely to end in a debt from the defendant to the bankrupt: and the defendant says that he is ready and willing, and hereby offers, to set off the amount so due to him, the defendant, as endorsee and holder of the said bill of exchange as aforesaid, against the claim of the plaintiff in respect of the matter herein pleaded to, and that, by the law of Scotland, he is entitled so to do, and such set-off forms an answer to the plaintiff's claim." held, that the plea was good. *MacFarlane v. Norris,* 783

SERVANT.

See MASTER AND SERVANT.

SERVICE OF PROCESS.

See REMOVAL, ORDER OF, III.

SESSIONS.

See QUARTER SESSIONS.

SET-OFF.

Scumble, that set-off is matter of procedure, and, as such, determinable by the lex fori. *MacFarlane v. Norris,* 783

See COSTS, II., IV., and TRUCK ACT.

SETTLEMENT, ORDER OF.

See PAUPER LUNATIC.

SEWERS.

See COMMISSIONERS OF SEWERS.

SICKNESS.

See REMOVAL, ORDER OF, I., II.

SIGNING JURY LISTS.

See CHURCHWARDEN, II.

SLANDER.

I. A coroner, holding an inquest on a dead body, is not liable to an action for words falsely and maliciously spoken by him in his address to the jury. *Thomas v. Charlton,* 475

II. Quare, per Cockburn, C. J., if they had been spoken by him maliciously, and without reasonable and probable cause? *Id.*

SOCIETY.

See BUILDING SOCIETY.

STAMP.

Omitting to. *See CLERK, ARTICLED, I.*

STATUTE.

Of Frauds.

I. A., at the request of B., entered into recognisances for the appearance of B.'s daughter at the Central Criminal Court, to which she had been committed to take her trial, on a charge of misdemeanor; and B., in consideration thereof, agreed to indemnify A. against all liability, and from all costs, damages and expenses in respect to the same. B.'s daughter not having appeared according to the recognisances, they were estreated, whereby A. was obliged to pay the amount, and incurred other expenses: held, that this was a special promise to answer for the debt, default or miscarriages of another person, within the Statute of Frauds, 29 Car. 2, c. 3, s. 4, and, as such, could not be sued on without an agreement or memorandum or note in writing. *Cripps v. Hartnoll,* 697

II. Quare, whether, in order to bring a case within sect. 4 of the Statute of Frauds, 29 Car. 2, c. 3, the debt or default must be towards the promissory? *Id.*

Of Limitations.

The last day for resealing a writ of summons, so as to save the Statute of Limitations, expired on Saturday the 28th December, within the Christmas holidays. A party who attended at the office on that day for the purpose found it shut, and the officer having refused to reseal the writ on the following Monday, the 30th, the Court refused to order him to do it afterwards, *nunc pro tunc.* *Evans v. Jones,* 45

Of Mortmain. *See DEVISE.*

SUMMONS, WRIT OF.

The last day for resealing a writ of summons, so as to save the Statute of Limitations, expired on Saturday the 28th December, within the Christmas holidays. A party who attended at the office on that day for the purpose found it shut, and the officer having refused to reseal the writ on the following Monday, the 30th, the Court refused to order him to do it afterwards, *nunc pro tunc.* *Evans v. Jones,* 45

SUNDAY.

See REMOVAL, ORDER OF, III. RAILWAY COMPANY, II.

SUPERINTENDENT REGISTRAR.

I. Under stat. 6 & 7 W. 4, c. 86, s. 7, the clerk to the board of guardians of a union created under stat. 4 & 5 W. 4, c. 76, has no right to be Superintendent Registrar except in the case of the first appointment after stat. 6 & 7 W. 4, c. 86, coming into operation; and on any subsequent vacancy the power of appointment is in the board of guardians. *The Queen v. Acason,* 795

II. W. A., who was clerk to the board of guardians of a union, created under stat. 4 & 5 W. 4, c. 76, and was also Superintendent Registrar appointed by the Registrar-General, under stat. 7 W. 4 & 1 Vict. c. 22, died on January 4th, 1861. On the 17th January, the defendant was appointed Superintendent Registrar by the board of guardians. On the 14th February, the relator was appointed clerk to the board of guardians. Upon information in the nature of quo warranto, Held, that the defendant was duly appointed Superintendent Registrar. *Id.*

TENANCY AT WILL.

See BUILDING SOCIETY.

TICKET.

See RAILWAY COMPANY.

TIME FOR APPEALING.

See QUARTER SESSIONS, APPEAL AT, I.

TITHE RENT CHARGE.

See DISTRICT PARISH.

TITLE DEEDS

See DETINUE.

TOTAL LOSS.

See MARINE INSURANCE.

TRAMWAYS.

See HIGHWAY, NUISANCE TO, I.

TRUCK ACT.

The defendants, master manufacturers, employed the plaintiff, an artificer, without any agreement in writing, to make stocking heels at 7d. a dozen. The plaintiff was to find the labour, and to work on the defendants' premises, using their frame. The settlements were weekly. The amount due for the plaintiff's work was first ascertained; then from the sum coming to him were deducted the following charges: (1.) Frame rent, for the use of the frame with which he worked, at 1s. 9d. per week. (2.) Machine rent, at 4d. per week. (3.) For standing room in the defendants' factory, at 3d. per week. (4.) Winding the yarn, at 1d. per week. (5.) Fines for irregular attendance, at 4½d. a quarter of a day for time of absence. (6.) Gas for lighting the defendants' factory, at 4d. per week. (7.) Fire for heating the defendants' factory. The amount of work performed by the plaintiff during the time he was in the defendants' employ varied from time to time, according to the state of trade, the plaintiff being sometimes employed for a greater and sometimes for a smaller number of hours in the day; but the charges, with the exception of the fines, were fixed and uniform, and were made whatever the amount of earnings. In an action to recover wages alleged to be due, the defendants pleaded Never indebted, and a set-off, consisting of the above charges. Held, per Pollock, C. B., Bramwell, B., and Byles, J. (affirming the judgment of the Court of Queen's Bench, which was founded upon the authority of Chawner v. Cummings, 8 Q. B. 311), Williams, Willes, and Keating, JJ., dissentientibus, that a contract to pay the plaintiff's wages, subject to the above deductions, was not a contract to pay part of such wages otherwise than in the current coin of the realm, within sect. 1 of the Truck Act, 1 & 2 W. 4, c. 37, and was therefore legal. *Archer v. James,* 61

TRUST ESTATE.

See DEVISE.

UMPIRE.

See PUBLIC HEALTH ACT, I.

UNREASONABLE.

Condition. See RAILWAY COMPANY, I.

Delay. See RAILWAY COMPANY, II.

VARIANCE.

An information under the 4 G. 4, c. 34, s. 3, described the defendant as having contracted to serve "T. B. and his partners." At the hearing it appeared that the contract of service was between the defendant and "T. B. on behalf of himself and his partners, constituting The R. M. & H. Coal Company (Limited)"; held, that this variance, if it were one, was cured by the 11 & 12 Vict. c. 43, s. 1. Whittle, appellant, *Frankland, respondent,* 49

WAGES.

See MASTER AND SERVANT, I., III., and TRUCK ACT.

WANT.

Of reasonable and probable cause. See SLANDER.

WAREHOUSE.

See GUNPOWDER.

WARRANT.

See ARREST.

WEIGHING MACHINE.

Upon the conviction of a railway Company under stat. 5 & 6 W. 4, c. 63, s. 28, for having in their possession a weighing machine which upon examination thereof, duly made by the inspector of weights and measures, was found to be incorrect: held, that a machine which, from its construction, was liable to variation from atmospheric and other causes, and required to be adjusted before it was used, was not incorrect upon examination, within the meaning of the statute, if examined by the inspector before it had been adjusted. *The London and North Western Railway Company, appellants, Richards, respondent,* 326

WILL, TENANCY AT

See BUILDING SOCIETY.

WITHDRAWAL OF INFORMATION.

See INFORMATION, WITHDRAWAL OF.

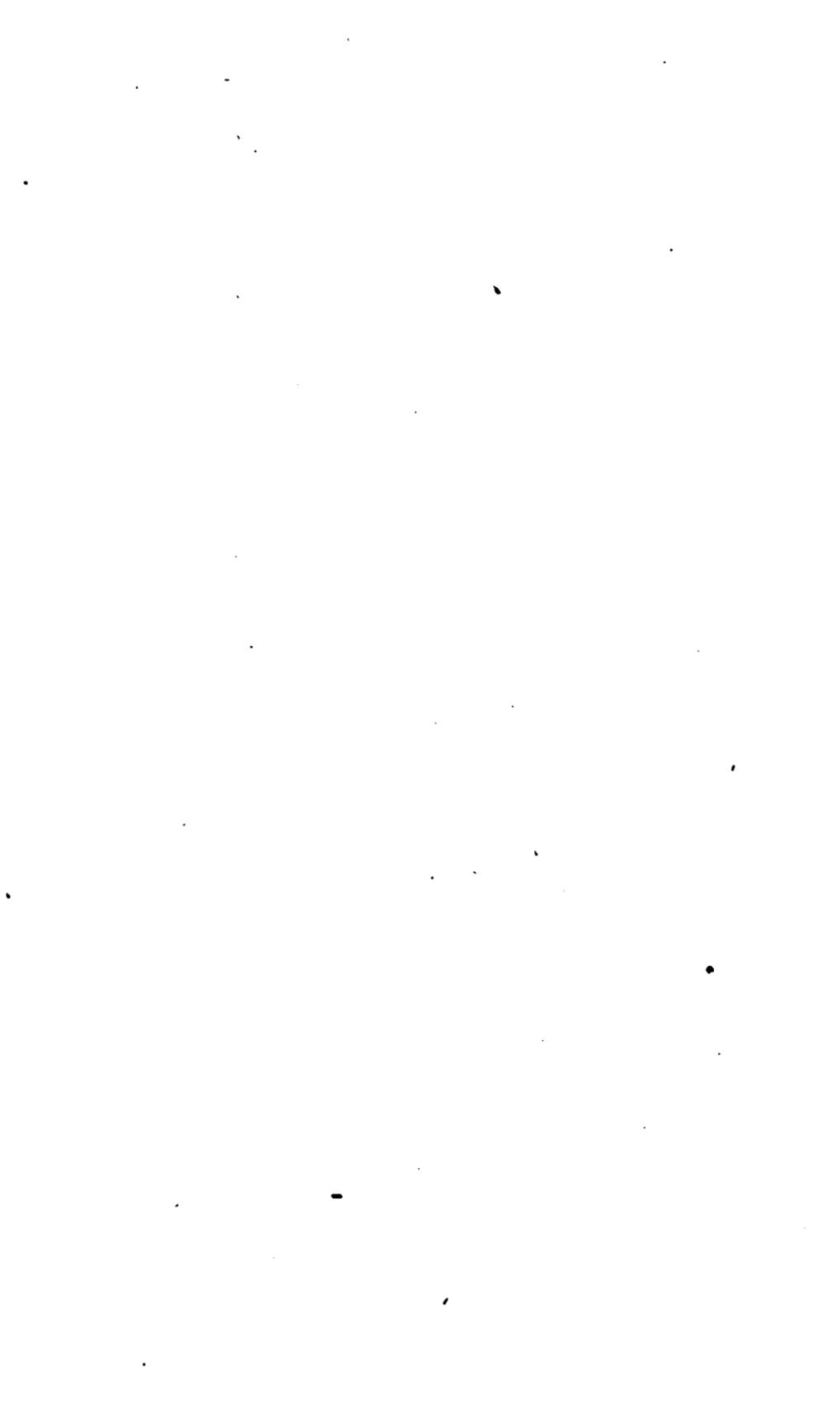
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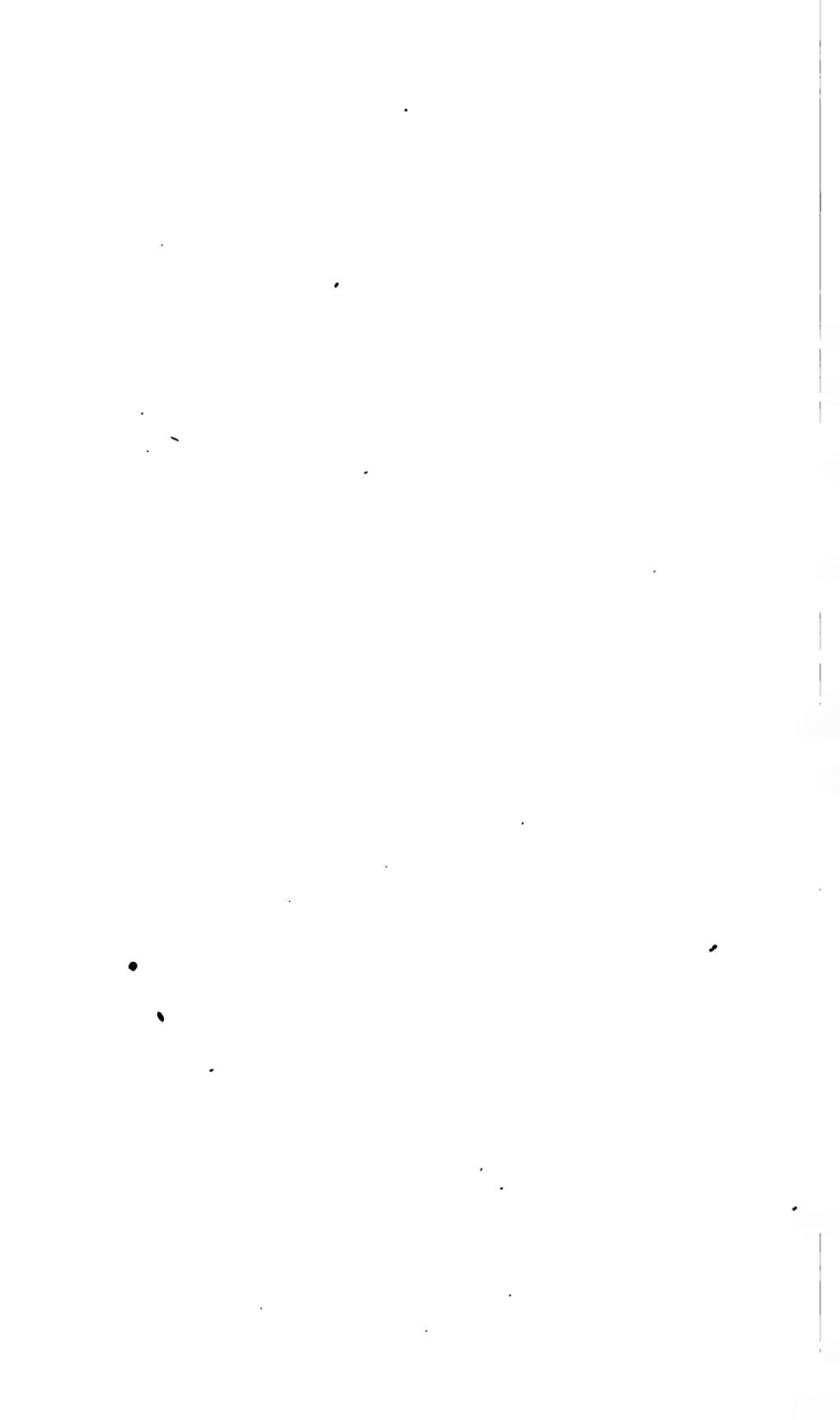
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WRIT OF SUMMONS.

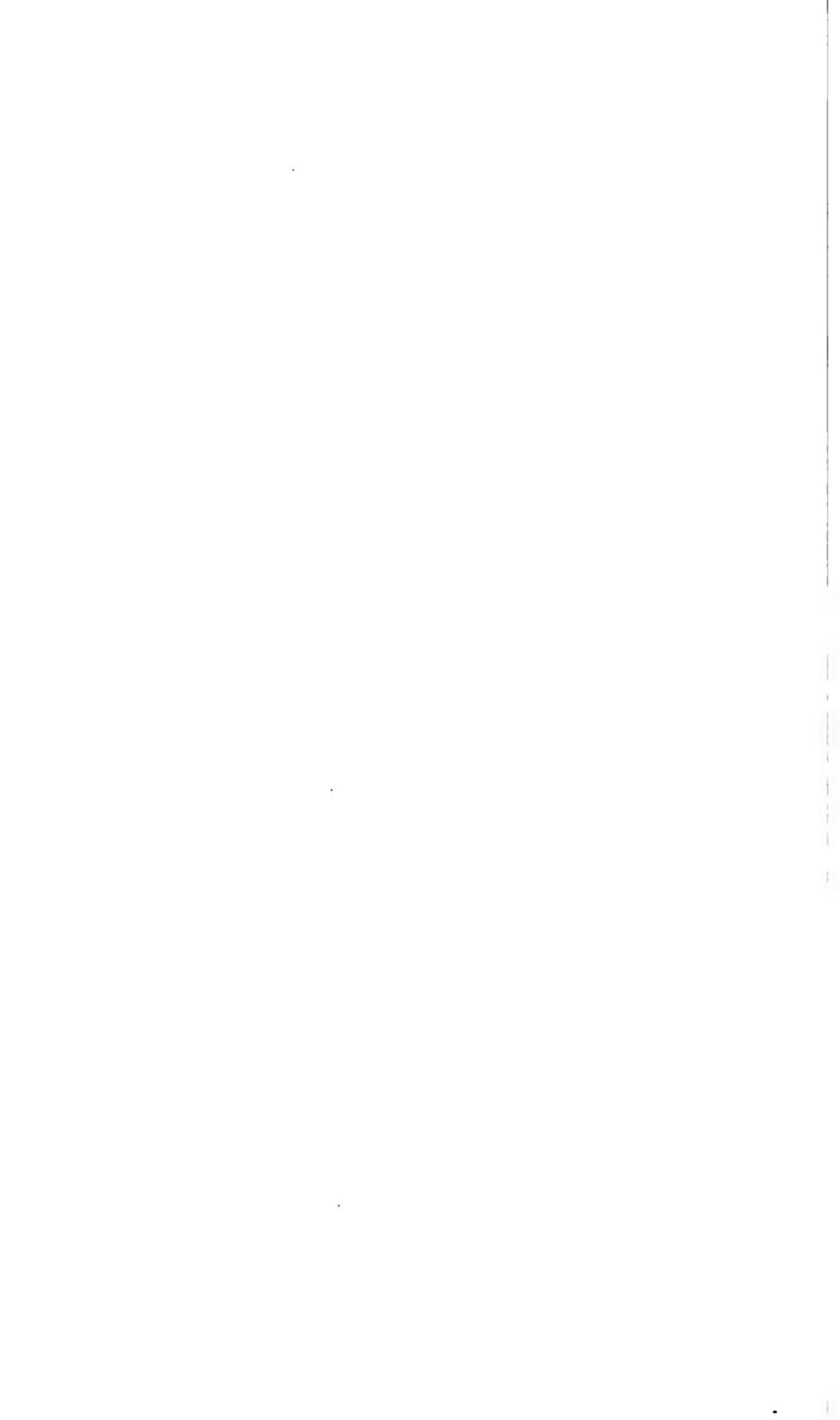
See SUMMONS, WRIT OF.















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